TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 98

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., AND BARR SHIPPING CORPORATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED JUNE 3, 1936

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vs.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., AND BARR SHIPPING CORPORATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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1 In United States District Court, Southern District of New York

No. C 98–14

UNITED STATES OF AMERICA

vs.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW AND ROBERT R. BARR, DEFENDANTS

Praecipe for transcript of record

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The Appellant hereby directs that in preparing the transcript of record of this cause in the United States District Court for the Southern District of New York, in connection with its appeal to the Supreme Court of the United States, that you include the following:

1. Indictment.
2. Demurrers.
3. Opinion.
4. Supplementary Opinion.
5. Judgment Sustaining Demurrers.
6. Petition for Appeal to the Supreme Court.
7. Statement of Jurisdiction of Supreme Court.
8. Assignment of Errors.
9. Order Allowing Appeal.
10. Notice of Service on Appellees of Petition for Appeal; Order Allowing Appeal; Assignment of Errors, and Statement as to Jurisdiction.
11. Citation.
12. Praecipe.

(Signed) MARTIN CONBOY,
Special Assistant to the Attorney General of the United States,
Counsel for Appellant.

2

Criminal docket

Docket ——

THE UNITED STATES

vs.

CURTISS-WRIGHT EXPORT CORPORATION; CURTIS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR

Conspiracy to violate Presidential Proclamation of May 28, 1934. Conspiracy to defraud the U. S. in the exercise of its proper governmental functions. Title 18, Sec. 88, U. S. C.

Date—month, day, year	Proceedings	Clerk's fees	
		Plaintiff	Defendant
Jan. 27, 1936	Filed Indictment		
Jan. 31, 1936	Curtis-Wright Export Corpn.; Pleads Not Guilty, by Mr. Shea, Atty.		
Jan. 31, 1936	Curtis Aeroplane & Motor Co., Inc.; Pleads Not Guilty, by Mr. Shea, Atty.		
Jan. 31, 1936	Barr Shipping Corporation; Pleads Not Guilty, by De Forest, Cullom & Elder, Attys.		
Jan. 31, 1936	John S. Allard; Pleads Not Guilty; Bail, $2,500; Paroled 4 P. M.		
Jan. 31, 1936	Clarence W Webster; Pleads Not Guilty; Bail, $2,500; Paroled 4 P. M.		
Jan. 31, 1936	Robert R. Barr; Pleads Not Guilty; Bail, $2,500; Paroled 4 P. M.		
Jan. 31, 1936	Sam'l. J. Abelow; Pleads Not Guilty; Bail, $2,500; Paroled 4 P. M. (to cover c. 98/26)		
Jan. 31, 1936	All individual defendants ordered fingerprinted; Robert P. Patterson		
Jan. 31, 1936	Filed recognizance for John S. Allard, $2,500; National Surety Corp'n.		
Jan. 31, 1936	Filed recognizance for Clarence W. Webster, $2,500; National Surety Corp'n.		
Jan. 31, 1936	Filed recognizance for Samuel J. Abelow, $2,500; National Surety Corp'n.		
Jan. 31, 1936	Filed notice of appearance for Barr Shipping Corp'n and Robert R. Barr, by De Forest, Cullom & Elder, Attys.		
Jan. 31, 1936	Filed notice of appearance for Clarence W. Webster and John S. Allard, by George Z. Medalie and George Sylvester, Attys.		
Jan. 31, 1936	Filed notice of appearance for Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Co., Inc., by Chadbourne, Stanchfield & Levy, Attys.		
Jan. 31, 1936	Filed notice of appearance for Samuel J. Abelow, by J. Edward Lumbard, Jr., Atty.		
Feb. 3, 1936	Filed Recognizance for Robert R. Barr, $2,500; National Surety Corpn.		
Feb. 18, 1936	Filed Demurrer to count 1 of indictment and motion to quash the same on behalf of defendant Samuel J. Abelow. (Memo. endorsed)		
Feb. 18, 1936	Filed Demurrer to count 1 of indictment and motion to quash the same on behalf of defendants Barr Shipping Corpn. and Robert R. Barr. (Memo. endorsed)		
Feb. 18, 1936	Filed Demurrer to count 1 of Indictment and motion to quash the same on behalf of defendants John S. Allard and Clarence W. Webster. (Memo. endorsed)		
Feb. 18, 1936	Filed Demurrer to count 1 of Indictment and motion to quash the same on behalf of defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc. (Memo. endorsed)		
Feb. 18, 1936	Demurrer argued as to all defendants. Decision reserved. Briefs to be submitted on February 19, 1936, before 4 P. M. Byers, J.		
Mar. 25, 1936	Filed Opinion by Judge Byers #9707. Demurrer to count 1 of the indictment sustained upon the first ground and overruled upon the second and third. Settle Order		
Apr. 8, 1936	Filed Affidavit and Order to show cause for re-argument of the demurrer		
Apr. 8, 1936	Filed Opinion by Judge Byers #9745. Settle order in accordance with the original opinion		
Apr. 20, 1936	Filed Order sustaining demurrer as to the first count and dismissing the first count of the indictment as to all defendants. Byers, J.		
May 5, 1936	Filed Petition of the United States for appeal to the Supreme Court of the United States from order sustaining demurrer to count one.		
May 5, 1936	Filed statement of Jurisdiction		
May 5, 1936	Filed Order allowing appeal to Supreme Court of the United States and permitting the United States a period of 45 days to file and docket said appeal. Byers, J.	$5.00	

United States District Court

C98–14

3 United States District Court

v.

CURTISS-WRIGHT EXPORT CORP'N ET AL.

Date—month, day, year	Proceedings	Clerk's fees	
		Plaintiff	Defendant
May 5, 1936	Filed Assignments of Errors		
May 5, 1936	Filed Citation		
May 5, 1936	Filed Notice of Service of Petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.		
May 5, 1936	Filed Praecipe for transcript of record		
May 5, 1936	Filed Notice of filing of praecipe and service of copy		

4 In United States District Court

Indictment

Filed Jan. 27, 1936

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that District, upon their oath present:

That at all times hereinafter mentioned Curtiss-Wright Export Corporation, one of the defendants herein, was a corporation organized under the laws of the State of New York, having its principal place of business at 30 Rockefeller Plaza, in the County, City, and State of New York; Curtiss Aeroplane & Motor Company, Inc., one of the defendants herein, was a corporation organized under the laws of the State of New York, having its principal place of business at Kenmore and Vulcan Streets, in the City of Buffalo, in the State of New York; Barr Shipping Corporation, one of the defendants herein, was a corporation organized under the laws of the State of Delaware, having its principal place of business at 25 Beaver Street, in the County, City, and State of New York.

That from on or about May 29, 1934, up to and including a date later than September 28, 1934, the exact date after said September 28, 1934, being to the grand jurors unknown, the said Curtiss-Wright Export Corporation, the said Curtiss Aeroplane & Motor Company, Inc., the said Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr, the defendants herein, in the County, City, State, and Southern District of New York and within the jurisdiction of this Court, did knowingly, wilfully, and unlawfully conspire, combine, confederate, and agree together and with each other and with divers other persons

5 whose names are to the grand jurors unknown, to commit an offense against the United States, that is to say, that the said defendants did knowingly, wilfully, and unlawfully conspire, combine, confederate, and agree together and with each other and with divers (other persons whose names are to the grand jurors unknown) to sell in the United States arms, to wit, fifteen (15) machine guns to Bolivia, that is to say, to the Country of Bolivia, one of the countries then and there engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress, entitled "Joint Resolution to Prohibit the Sale of Arms and Munitions of War in the United States under Certain Conditions", approved May 28, 1934, and the provisions of the Proclamation issued on May 28, 1934, by the President of the United States pursuant to authority provided in Section One of the aforesaid Joint Resolution.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the object thereof at the Southern District of New York and within the jurisdiction of this Court, on or about July 17, 1934, defendant John S. Allard had a conversation with one Palmer A. Hewlett.

2. And further in pursuance of said conspiracy and to effect the object thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about July 17, 1934, defendant Clarence W. Webster, had a conversation with the said Palmer A. Hewlett.

3. And further in pursuance of said conspiracy and to effect the object thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about July 17, 1934, defendant Barr Shipping Corporation executed and caused to be executed a railroad bill of lading form.

6 Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 88, Title 18, United States Code.)

SECOND COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate, as if herein set forth in full, all of the allegations contained in the first two paragraphs of the first count of this indictment, and do further present that heretofore, to wit, on or about the 29th day of May 1934 and continuing up to and including the date of the filing of this indictment, in the City, County, State, and Southern District of New York and within the jurisdiction of this Court, Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr, the defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate, and agree together and with

each other and with divers other persons to the grand jurors unknown, to defraud the United States of and concerning its governmental function and right to administer the Bureau of Customs of the Treasury Department of the United States in the clearance of vessels from ports of the United States to foreign ports by the Bureau of Customs in accordance with the statutes of the United States and regulations promulgated thereunder, and of and concerning its governmental right and function, to wit, of and concerning its right and function of administering the Bureau of Foreign and Domestic Commerce of the United States Department of Commerce in the collection, maintenance, and dissemination of statistical returns of exports of domestic commodities in the following manner:

7 It was a part of said conspiracy that certain merchandise, to wit, 15 machine guns, would be packed and inserted for shipment in cases containing airplanes.

It was further a part of said conspiracy that the said defendants, in order to conceal from the Collector of Customs at the Port of New York the true nature of all of the merchandise so packed for shipment, would execute and cause to be executed under oath a shipper's export declaration, required by the regulations of the Bureau of Customs, promulgated by the Secretary of the Treasury under authority of the statutes of the United States, which was false in that it falsely described the merchandise to be shipped as airplanes, whereas in truth and in fact the merchandise so packed for shipment consisted of 15 machine guns in addition to the airplanes specified, thereby causing the said Collector of Customs to furnish to the Bureau of Foreign and Domestic Commerce false and misleading statistics of the kind, quantity, and value of merchandise exported from the United States.

It was further a part of said conspiracy that the defendants would cause the said false shipper's export declaration to be accepted as true, and numbered and filed by the Collector of Customs at the Port of New York as a true, correct, and genuine record of the Bureau of Customs.

It was further a part of said conspiracy that the defendants by means of the said false shipper's export declaration would mislead the Collector of Customs by deceiving him as to the true nature of the said shipment and would thereby cause the said Collector of Customs to issue to the master of the vessel carrying said merchandise a clearance certificate based upon false and misleading information.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects
8 thereof, at the Southern District of New York and within the jurisdiction of this Court, the defendant Barr Shipping Corporation executed or caused to be executed a shipper's export declaration on the 27th day of July 1934.

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about July 27, 1934, the defendant John S. Allard wrote and caused to be written a letter addressed as follows:

"Mr. Hamilton, Deputy Collector of Customs, Customhouse, New York City."

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about July 17, 1934, the defendant John S. Allard had a conversation with one Palmer A. Hewlett.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about July 17, 1934, the defendant Clarence W. Webster had a conversation with said Palmer A. Hewlett.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 88, Title 18, United States Code).

MARTIN CONBOY,
Special Assistant Attorney General.

ETD

[File endorsement omitted.]

JAN. 31, 1936.

Curtiss-Wright Export Corporation Pleads Not Guilty by Mr. Shea, Atty.

Curtiss Aeroplane & Motor Co., Inc., Pleads Not Guilty by Mr. Shea, Atty.

Barr Shipping Corpn. Pleads Not Guilty by DeForest, Cullony & Elder, Attys.

John S. Allard Pleads Not Guilty. Bail $2,500. Paroled 4 P. M.

C. W. Webster Pleads Not Guilty. Bail $2,500. Paroled 4 P. M.

Robert R. Barr Pleads Not Guilty. Bail $2,500. Paroled 4 P. M.

Samuel J. Abelow Pleads Not Guilty. Bail $2,500 to cover C 98/26. Paroled 4 P. M.

All individual defendants ordered to be fingerprinted.

ROBERT P. PATTERSON, *D. J.*

9 In United States District Court

[Title omitted.]

Demurrer to first count

Filed Feb. 18, 1936

And now, to wit: February 17, 1936, come defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc., by their attorneys, Chadbourne, Stanchfield & Levy, and

demur to the first count of the indictment filed January 27, 1936, and move the Court to quash the same, and assign therefor the following reasons.

1. Said count of the indictment does not charge facts sufficient to show the commission by the said defendants, or either of them, of any offense against any law of the United States.

2. Said count of the indictment charges a conspiracy to violate the Joint Resolution of Congress, approved May 28, 1934, and the Presidential Proclamation issued, pursuant thereto, on May 28, 1934, both of which have expired according to the terms of the said Joint Resolution, by reason of the revocation contained in the Presidential Proclamation issued November 14, 1935, and were not in force at the time when the said indictment was found.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Defendants, CURTISS-WRIGHT EXPORT CORPORATION, and CURTISS AEROPLANE & MOTOR COMPANY, INC., *Office and Post-Office Address, 25 Broadway, Borough of Manhattan, New York, N. Y.*

10 (Endorsed:) February 11, 1936. Copy Received February 11, 1936. Lamar Hardy, United States Attorney, for Martin Conboy, Special Assistant to Attorney General.

February 18, 1936. Motion Argued. Decision Reserved. Briefs to be submitted on February 19, 1936, before 4 P. M.

[File endorsement omitted.]

11 In United States District Court

(Title omitted.)

Demurrer to first count.

Filed Feb. 18, 1936

And now, to wit: February 17, 1936, come John S. Allard and Clarence W. Webster, by their attorney George Z. Medalie, and demur to Count I of the indictment filed and move the Court to quash the same, and assign therefor the following reasons:

1. Said count of the indictment does not charge facts sufficient to show the commission by the said defendants of any offense against any law of the United States.

2. Said count of the indictment charges a violation of a Joint Resolution and Presidential Proclamation issued pursuant thereto, which have expired according to the terms of the Joint Resolution by revocation of the Presidential Proclamation, dated November 14, 1935.

GEORGE Z. MEDALIE,
Attorney for Defendants John S. Allard and Clarence W. Webster, Office & P. O. Address, 70 Pine Street, Borough of Manhattan, City of New York.

12 In United States District Court

(Title omitted.)

Affidavit of John S. Allard

Filed Feb. 18, 1936

JOHN S. ALLARD, being duly sworn, says: I am one of the defendants above named and am advised and believe that the indictment, as laid, is insufficient in law and that the demurrer and motion to quash is made in good faith and not merely for purposes of delay.

J. S. ALLARD. (Signed)

Sworn to before me this 11th day of February 1936.

Marie A. Buedingen.

[SEAL] (Signed) MARIE A. BUEDINGEN,
Notary Public, New York County.

New York Co. Clk. No. 488, Reg. No. 6B421. Commission expires March 30, 1936.

13 In United States District Court

[Title omitted.]

Affidavit of Clarence W. Webster

Filed Feb. 18, 1936

CLARENCE W. WEBSTER, being duly sworn, says: I am one of the defendants above named and am advised and believe that the indictment, as laid, is insufficient in law and that the demurrer and motion to quash is made in good faith and not merely for purposes of delay.

(Signed) CLARENCE W. WEBSTER.

Sworn to before me this 11th day of February 1936.

Marie A. Buedingen,

[SEAL] (Signed) MARIE A. BUEDINGEN,
Notary Public, New York County.

New York Co. Clk. No. 488, Reg. No. 6B421. Commission expires March 30, 1936.

14 (Endorsed:) February 11, 1936. Copy Received February 11, 1936. Lamar Hardy, United States Attorney, for Martin Conboy, Special Assistant to Attorney General.

February 18, 1936. Motion Argued. Decision Reserved. Briefs to be submitted on February 19, 1936, before 4 P. M.

[File endorsement omitted.]

15 In United States District Court

[Title omitted.]

Demurrer to first count

Filed Feb. 18, 1936

And now, to wit: February 17, 1936, comes Samuel J. Abelow, by his attorney J. Edward Lumbard, Jr., and demurs to Count I of the indictment filed and moves the Court to quash the same, and assigns therefor the following reasons:

1. Said count of the indictment does not charge facts sufficient to show the commission by the said defendant of any offense against any law of the United States.

2. Said count of the indictment charges a violation of a Joint Resolution and Presidential Proclamation issued pursuant thereto, which have expired according to the terms of the Joint Resolution by revocation of the Presidential Proclamation, dated November 14, 1935.

J. Edward Lumbard, Jr.,
(Sgd.) J. EDWARD LUMBARD, JR.,
Attorney for Defendant, Samuel J. Abelow, Office & P. O. Address: 2 Wall Street, Borough of Manhattan, New York, N. Y.

(Endorsed:) Feb. 18, 1936. Motion Argued. Decision Reserved. Briefs to be submitted on February 19, 1936, before 4 P. M.

February 11, 1926. Copy received. Lamar Hardy for Martin Conboy, Special Assistant to Attorney General.

[File endorsement omitted.]

17 In United States District Court

[Title omitted.]

Demurrer to first count

Filed Feb. 18, 1936

And now, to wit: February 17, 1936, come Barr Shipping Corporation and Robert R. Barr, by their attorneys De Forest, Cullom & Elder, and demur to Count I of the indictment filed and move the court to quash the same, and assign therefor the following reasons:

1. Said count of the indictment does not charge facts sufficient to show the commission by the said defendant of any offense against any law of the United States.

2. Said count of the indictment charges a violation of a Joint Resolution and Presidential Proclamation issued pursuant thereto, which

have expired according to the terms of the Joint Resolution by revocation of the Presidential Proclamation, dated November 14, 1935.

(Sgd.) DE FOREST CULLOM & ELDER,
Attorneys for Defendants Barr Shipping Corporation and Robert R. Barr, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York.

18 In United States District Court

[Title omitted.]

Affidavit of Robert R. Barr

Filed Feb. 18, 1936

ROBERT R. BARR, being duly sworn, deposes and says:

I am one of the defendants above-named and vice president of Barr Shipping Corporation, a defendant herein, and am advised and believe that the indictment, as laid, is insufficient in law and that the demurrer and motion to quash is made in good faith and not merely for purposes of delay.

(Sgd.) ROBERT R. BARR.

Sworn to before me this 11th day of February 1936.

Grace E. Lowendahl,
(Sgd.) GRACE E. LOWENDAHL,
Notary Public, New York County.

N. Y. Co. Clk.'s No. 278 Reg. No. 6–L–291. Kings Co. Clk.'s No. 137, Reg. No. 6211. Bronx Co. Clk.'s No. 26, Reg. No. 85–L–36. Queens Co. Clk.'s No. 453, Reg. No. 2366. Commission Expires March 30, 1936.

19 (Endorsed:) February 11, 1936. Copy Received February 11, 1936. Lamar Hardy for Martin Conboy, Special Assistant to Attorney General.

February 18, 1936. Motion Argued. Decision Reserved. Briefs to be submitted on February 19, 1936, before 4 P. M.

[File endorsement omitted.]

20 In United States District Court, Southern District of New York

C 98–14

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, DEFENDANTS

March 24, 1936

Martin Conboy, Esq., Special Assistant to the Attorney General, Attorney for the plaintiff (Martin Conboy, Esq., and Edward J.

Ennis, and David W. Wainhouse, Esq., Asst. U. S. Attorneys, of counsel).

Chadbourne, Stanchfield & Levy, Esqs., Attorneys for defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc. (Robert D. Shea, Esq., of counsel).

De Forest, Cullom & Elder, Esqs., Attorneys for defendants Barr Shipping Corporation and Robert R. Barr (Henry W. Steingarten, Esq., of counsel).

George Z. Medalie, Esq., Attorney for defendants John S. Allard and Clarence W. Webster.

J. Edward Lumbard, Jr., Esq., Attorney for defendant Samuel J. Abelow.

Opinion

Filed March 25, 1936

BYERS, D. J.: The defendants have been indicted in this court for conspiring to violate the "Joint Resolution to Prohibit
21 the Sale of Arms and Munitions of War in the United States under Certain Conditions," approved May 28, 1934, and the provisions of the Proclamation issued on May 28, 1934, by the President of the United States pursuant to authority provided in Section One of the Joint Resolution.

The indictment contains a second and substantive count, not presently involved.

The defendants have demurred to the conspiracy count because they object to facing a criminal charge for which they assert that there is no constitutional basis.

The duty of the court to inquire fully into the issues thus raised seems to pertain to the very essence of our present system of government.

Such was the procedure in United States v. Chavez, 228 U. S. 525.

The Joint Resolution of May 28, 1934, under which the prosecution is laid is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the
22 governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

"SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

The Proclamation bears the same date, and reads:

"Whereas section 1 of a joint resolution of Congress, entitled 'Joint Resolution To Prohibit the Sale of Arms or Munitions of War in the United States under Certain Conditions', approved May 28, 1934, provides as follows: * * *

"Now, therefore, I Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred on me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the pro-
23 hibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

"And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

"And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder.

24 "In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the city of Washington this twenty-eighth day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

"FRANKLIN D. ROOSEVELT.

"By the President:

"CORDELL HULL,

"*Secretary of State.*"

The Proclamation of revocation is dated November 14, 1935, and so far as presently material is as follows:

"Whereas by a Proclamation of the President issued on May 28, 1934, pursuant to a Joint Resolution of Congress approved by the President on the same date, it was declared that the prohibition of

the sale of arms and munitions of war in the United States to those countries then engaged in armed conflict in the Chaco might contribute to the reestablishment of peace between those countries; and

"Whereas by virtue of the Joint Resolution and the Proclamation above mentioned it became unlawful to sell arms or munitions of war to Bolivia or Paraguay; and

"Whereas the Peace Conference in Plenary Session in Buenos
25 Aires formally adopted on October 28, 1935, a Resolution declaring that the war between Bolivia and Paraguay had come to an end; * * *

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reestablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

"In witness whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

26 "Done at the City of Washington this 14th day of November, in the year of our Lord nineteen hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

[SEAL] "FRANKLIN D. ROOSEVELT.

"By the President:

"CORDELL HULL,

"*Secretary of State.*"

The indictment as here involved charges the commission of three overt acts in pursuance of the alleged conspiracy, by three individual defendants and one corporate defendant, during July, 1934; that is, during the period in which the Joint Resolution was said to be in force in virtue of the first Presidential Proclamation and before its stated revocation, by the second.

The objections urged in behalf of the demurrer are:

First. That the Joint Resolution did not accomplish a valid delegation of legislative power to the Executive.

Second. That the Executive did not meet the requirements laid upon him by the terms of the Joint Resolution, in issuing his first Proclamation, and in consequence the latter was legally insufficient to render the former operative.

Third. That, in any case, prosecution for the alleged offenses could not be instituted after the effective date of the second proclamation, November 29, 1935, and hence this indictment which
27 was found January 27, 1936, does not lie.

The first objection draws into question the concept which is embodied in the following words of the Joint Resolution:

"Resolved * * *, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged * * * may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics * * * he makes proclamation to that effect, it shall be unlawful to sell * * * until otherwise ordered by the President or by Congress", etc.

The argument runs, that Congress declares that the commission of a crime will result from the violation of a Joint Resolution, if that resolution is put into operation by the Executive, as the result of the exercise by him of an assumed capacity to forecast the probable result of so imparting vitality to the legislation.

It is said that this constitutes an attempt to substitute Executive determination, as to the probable future efficacy of a given law, for legislative judgment on the subject, and that the constitution confides no such function to other than the law-making department of our government.

28 The expression quoted employs the words "if the President finds" which would be appropriate to an existing, or to a past state of facts; in their legal sense, they cannot refer to future contingencies, i. e., that which "may contribute to" a desired result, if precision in the formulation of a criminal law is fairly to be required.

If accurate language had been employed, the resolution would have read something like this: "if the President shall be of the opinion that the reestablishment of peace is likely to result from the prohibition of the sale", etc., and for present purposes the resolution must be construed as though it had been enacted in that form, for that is what it means.

The implication of such a formula would have been, that if the Executive should be of the opinion that the desired result was *not* likely to be accomplished by putting the Joint Resolution into effect, it would suffer still birth.

Examination of the question will proceed as though the legislative purpose had found expression in words appropriate to embody that which alone is implicit in the resolution.

The Government asserts that there has been no "improper delegation of legislative authority to the Executive" because the resolution declares the policy of the Congress and fixes the limits of the

29 Executive policy. Reliance is had upon the following:

Hampton & Co. v. U. S., 276 U. S. 394:

Here there was a review of a judgment of the United States Customs Court sustaining a rate of duty on imports, increased by presidential proclamation pursuant to authority conferred by Section 315, Title III, of the Tariff Act of 1922. The statute authorized an increase in duties if the President after investigation "shall find it thereby shown (by the investigation) that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same."

In other words, the Executive was empowered to cause a mathematical calculation to be made, upon current data, as the basis for a true "finding", and to act in obedience to the result.

The opinion of the Supreme Court, upholding the delegation by Congress of its tariff making powers in such a restricted way, and according to so clear a formula, serves to bring into contrast that which was there found to be valid, and that which has here been attempted.

30 Avent v. U. S., 266 U. S. 127:

This case, in upholding the denial of a motion in arrest of judgment in a criminal case, decides that Congress could delegate to the Interstate Commerce Commission the power to suspend its rules and to issue orders giving priority and preference in the conduct of interstate commerce, and could make a violation of its rules a crime. The basis for such orders was the Transportation Act of 1920, which "authorizes the Interstate Commerce Commission, whenever it is of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it", etc.

This clearly delegated to the Commission the power to act with reference to an existing state of affairs which in its opinion required action to meet a present emergency. There was no effort to clothe the Commission with the power to act or to refrain from acting according to its opinion as to whether given legislative purpose "may contribute" to a future result.

U. S. v. Grimaud, 220 U. S. 506:

Here a demurrer to an indictment was overruled, in a case involving the use by the defendant of a portion of the national forest

31 reserve, for the grazing of sheep, without procuring a permit from the Secretary of Agriculture; the issuance of such a permit was held to have been within the contemplation of Congress, because the act creating the reserve provided for the ingress and

egress of resident settlers complying with the rules and regulations covering such reservation; it declared that the Secretary should make such rules, and that any violation of the law itself "or such rules and regulations shall be punished."

The court declared that the delegation of administrative powers was necessary and valid, that the broad purposes of the law were established by Congress, and that the issuance of such a permit as the defendant had failed to procure was within the administrative competency of the Secretary.

In reaching this conclusion, the court quoted with approval the following language from the opinion in Marshall Field & Co. v. Clark, 143 U. S. 649, at 694:

"The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government."

The Aurora, 7 Cranch 382:

32 For a discussion of the issues involved in this case, and an understanding of the nature of the functions delegated by Congress to the Executive, reference should be had to the opinion in Panama Refining Co. v. Ryan, 293 U. S. 388 at 423.

Presently it may be said that the President was empowered to declare that France or Great Britain had revoked or modified edicts which were inimical to the United States, and if that fact were embodied in a Proclamation, the trade suspended by the Act of Congress and by the act laying an embargo, might be "renewed with the nation so doing."

The President was not authorized to hazard an opinion as to the probable effect, in the future, of certain legislation; he was empowered to establish a state of existing fact concerning governmental action which had been taken by a foreign power.

U. S. v. Chavez, 228 U. S. 525:

Here a decision sustaining a demurrer was reversed in a criminal cause in which the defendant was charged with violating a joint resolution which made it a crime to export munitions of war; the indictment averred that the defendant made such "a shipment of said munitions of war from said city of El Paso and with said Ciudad Juarez in Mexico as the destination" from one part of El Paso to another.

Apparently the court below had sustained the demurrer on the
33 theory that export had not been completely alleged, because there was no averment that delivery in Mexico had been consummated. This view was rejected by the Supreme Court.

The rule of decision in that case does not touch the point of attack upon this demurrer, but the joint resolution of March 14, 1912, which was rendered operative by Presidential Proclamation, is of great importance, thus:

"SECTION 1. That whenever the President shall find that in any American country conditions of domestic violence exist which are

promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President shall prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"SECTION 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or by imprisonment not exceeding two years, or both."

The proclamation implementing the foregoing bore date of April 12, 1912.

It will be seen that the President was authorized to bring
34 into operation a law, a violation of which would constitute a crime, as the result of finding an existing condition of facts, namely, domestic violence in another country, promoted by the use of arms procured from this country. The distinction between such a state of then existing fact, and what it was hoped, on May 28, 1934, "may contribute" to a future consummation, seems to be obvious.

The point of departure from the foregoing examples of a sanctioned delegation of power to declare a legislative purpose effective in the event that certain prescribed conditions are found to exist, which stands forth clearly in the subject-matter of this examination, is thought to be of an entirely practical and substantial nat

If Congress had conduced a hearing in order to inform itself as to the probable effect of the proposed legislation, those who now stand at this bar, charged with the commission of crime because they did sell the interdicted implements in the ordinary course of business, might have been able to demonstrate to Congress that the reestablishment of peace, between the belligerents in the Chaco dispute, would not be promoted by cutting off a supply of munitions of war from this country; that foreign sources of supply would still be available to the combatants, and that the purpose of the resolution would not come to fruition as the result of the contemplated embargo.

35 Had such process been employed, these defendants would have had an opportunity to submit their data for the information of Congress, and in aid of the essentially legislative function of determining the probable effect of the contemplated measure. Instead, the Executive was empowered to make up the legislative mind as to the future efficacy of the law, as the reason for giving vitality to it (and apparently this was done without according a hearing to any one likely to be affected).

It is thought that the Joint Resolution embodied such an attempted abdication of legislative responsibility as to deprive it of constitutional validity. Stated in lowest terms, it is conceived to be the duty of Congress alone to conclude whether a given law will work.

The defendants rely largely upon the decisions of the Supreme Court in the Panama case, supra, and in A. L. A. Schechter Poultry Corp. v. U. S., 295 U. S. 495, which involved broader delegations of legislative duty to the Executive department of the government, than are here presented. It is not thought that those decisions necessarily control the matter here examined, but that the distinction pointed out in the opinion in the latter case (Schechter v. U. S., 295 U. S. 495, at 538) between a true finding of fact, and the formulation of an opinion concerning future probabilities, is such a recognition of the issue here presented, that this court is precluded
36 from reaching any conclusion but that the first ground of demurrer is fatal to the indictment.

Upon the assumption that this conclusion is mistaken, there remain to consider the other objections to the indictment.

As to the argument that there was a failure by the President to consult with the governments of other American Republics, "and, with their cooperation, as well as that of such other governments as he may deem necessary" take action as permitted (because the proclamation bears the same date as the Joint Resolution, which means that the consultations could not have been had and the cooperation could not have been secured in so short a space of time) there is this to be said:

The Proclamation recites the "finding" that the prohibition in question "may contribute to the reestablishment of peace" between the combatant countries, "and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution."

It is thought that this recital of what has been done precludes inquiry on the subject by the court. The joint resolution does not require that the Proclamation shall recite the processes con-
37 ducted by the Executive, which might lead to its issuance. The mere statement that the prescribed things have been done by the President which the Joint Resolution said were requisite to the issuance of the Proclamation, is conclusive for present purposes.

The defendants argue that there is a difference between the legislative specification and the Executive performance, namely, that the former was of actual cooperation by the governments of other American Republics, while what was obtained, according to the Proclamation, was the assurance of cooperation; and that this difference constitutes a fatal legal infirmity in the vitalizing Executive process.

The ready answer is that the President was not instructed as to the exact measure or manifestation of cooperation which he was expected to secure from other nations. An assurance of cooperation implies a meeting of the minds, and thus of itself constitutes the essential element of the specified requirement. It does not lie with this court to apply a more precise test. Congress was satisfied that the Proclamation was adequately supported, for the Joint Resolution was not altered, nor was its duration abbreviated by legislative action;

therefore it would seem that this court may not with propriety inquire further into the subject. This ground of demurrer is thought to be without support.

38 The third objection goes to the reservation contained in the second Proclamation to the effect that the revocation of the original Joint Resolution "shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred" during the effective period thereof.

The argument is, that this was the attempted exercise by the Executive of a purely legislative function, and that the President was not competent, in the legal sense, to keep alive the asserted criminal liability of these defendants.

Reliance is had upon the general principle stated for instance in Yeaton v. U. S., 5 Crauch 281 (a forfeiture case for violation of the non-intercourse law of 1806) "that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by the statute." It is urged that only by legislative action could the right of prosecution be retained for alleged violation of this Joint Resolution while it was extant, and that the power to do this was not confided to the President, and if that was attempted, the delegation was without warrant in the constitution.

39 It is said that Section 13 Revised Statutes (1 U. S. C., § 29) has no application. That provision is:

"Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is said that the word "repeal" was used in a precise sense, and was intended to mean the abrogation of one statute by another, and was not intended to accomplish the survival of liability to prosecution initiated after the expiration or termination of this Joint Resolution.

It will be observed that this argument attributes to Congress the initial purpose of forbidding the export to certain countries of munitions of war, during a period to be limited by the President or Congress; and the further purpose that immunity from prosecution for a violation of the embargo should arise upon the expiration thereof. Is this incongruity of intention plainly to be perceived?

To answer that question, requires an understanding of the law in response to which the quoted statute was enacted. It was

40 stated in Yeaton v. U. S., supra, by Chief Justice Marshall, in a forfeiture cause in Admiralty based upon an alleged violation of the non-intercourse act of 1806 (an appeal having been

presented after the expiration of the statute, and being deemed to constitute a hearing de novo):

"* * * a sentence of condemnation cannot be pronounced on account of a forfeiture which accrued under a law not in force at the time of pronouncing such sentence, unless by some statutory provision the right to enforce such forfeiture be preserved."

The foregoing is quoted from the "sentence" of the court, and follows a statement of its opinion reading: "* * * it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

See also The Irresistible, 7 Wheat. 551, in which it is said by the same authority: "Now, it is well settled that an offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose."

United States *v.* Tynen (1871), 11 Wall. 88, decided that a criminal prosecution laid under a statute of 1813 having to do with
41 offenses against the naturalization laws must be dismissed, because after the indictment had been demurred to in the Circuit Court, Congress passed a new statute which was approved in July 1870, covering the same subject, and which was repugnant to the earlier statute and thereby accomplished its repeal, although in terms there was no such provision.

The repeal having been accomplished, prosecution under the old law could not be had.

Revised Statutes, Section 13, was passed on February 25, 1871, eight days after the submission of the Tynen case to the court, and may be thought to have reflected a legislative purpose to avoid a repetition of the legal situation therein disclosed.

The statute dealt with the subject of "repeal", although the earlier cases above quoted referred to the expiration of temporary laws, as well as to the repeal of those of more permanent character.

Whether there is a distinction to be made concerning the necessity for preserving penalties, depending upon whether expiration or repeal is involved, may be laid aside for the moment. It is clear that the continuance of responsibility to answer a criminal charge under such circumstances is a matter of legislative concern. It pertains to the law-making power.

42 If survival of liability is asserted, it must proceed either from the silence of the repealing statute concerning immunity (by reason of Section 13, Revised Statutes) or from a direct and appropriate expression of the legislative purpose. It is not a subject for Executive pronouncement.

The most recent example of similar legislation with which the court is familiar is Joint Resolution 67 of the 74th Congress, approved August 31, 1935. It prohibits, among other things, the export of arms, etc., to belligerent countries. As amended February 29, 1936, it provides: "Whenever the President shall find that there

exists a state of war between two or more foreign states" the prohibition shall become effective through Presidential proclamation; he is given the power to revoke when the described conditions have ceased to exist, in his judgment, and it continues:

"Except with respect to prosecutions (sic) committed or forfeitures incurred prior to March 1, 1936, this Section and all proclamations issued thereunder shall not be effective after February 29, 1936."

The foregoing was amended on the last-mentioned date to read:

"Except with respect to offenses committed, or forfeitures incurred prior to May 1, 1937, this Section and all proclamations issued thereunder shall not be effective after May 1, 1937."

43 This is such an expression of legislative purpose, respecting the survival of liability beyond the duration of the resolution, as to remove the subject from the field of inquiry. It is compatible only with a recognition that the will of the legislative and not that of the Executive department of the government was involved in the law-making process.

The presence of such a provision in the Joint Resolution under examination, of course, would have avoided the issue now raised.

If the reasoning thus far is sound, it results that the proviso preserving beyond November 29, 1935, responsibility to answer for alleged violations committed while the law was in operation, was without effect, because it is part of a Presidential Proclamation and not of the Joint Resolution. It neither added to, nor subtracted from, the legal status of those charged with offending against the embargo. There seems to be nothing in the Joint Resolution delegating to the President the power or authority to assert the reservation stated in the proviso.

There remains to consider whether the omission by Congress to fortify the May 28, 1934, Joint Resolution, in respect of prosecution for offenses committed before its expiration, leads to the result asserted by the defendants:

44 When the resolution was under advisement, Congress contemplated that it would come to a termination at some future time, not as the result of the passage of an act of repeal, but in obedience to the self-contained formula of duration.

Congress was also aware of Section 13 of the Revised Statutes. Commenting upon that law, the Supreme Court has said, in Great Northern R. Co. v. U. S., 208 U. S. 452, at 465: "* * * the provisions of § 13 are to be treated as if incorporated in and as a part of the subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law, the section (Hepburn Act) must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13."

In formulating the Joint Resolution, Congress must be deemed to have considered that the necessity for preserving to the government

the right to prosecute here asserted, had been anticipated by Section 13 of the Revised Statutes. A contrary view would not accord with the foregoing interpretation of the statute.

To recur to the argument of the defendants, that a repeal
45 by statutory enactment differs from the expiration of a law intended to continue temporarily, it must be observed that no good reason is presented to support such a fancied distinction.

It is not thought that Congress entertained one purpose concerning offenses committed during the life of a statute having indefinite duration, and subject to termination by statutory repeal, and an opposite purpose, or no purpose, with respect to a law having a temporary existence which would come to an end as stated in its own terms. In both cases, it is the survival of responsibility for a violation, that is of the essence, and not the nature of the occasion upon which that survival rests.

It is therefore concluded that the absence of such a proviso, in the Joint Resolution under discussion, does not constrain the court to accept the defendants' views on this branch of the case.

It must be conceded that this conclusion may be thought to be impaired by the terms of Joint Resolution 67 of the 74th Congress, above-quoted. It may well be argued that Congress has therein written its own understanding of the necessity for the inclusion of such a reservation, and the force of the argument is not to be denied. It is presently preferred, however, to interpret the presence of that expression as manifesting choice rather than necessity, as something added from an abundance of caution and to preclude
46 any question such as is here presented, rather than as a recognition that its absence would be fatal to a prosecution for an offense dating within, but laid beyond, the effective period.

The defendants rely principally on U. S. v. Chambers, 291 U. S. 217, in which it was decided that the Volstead law did not survive the adoption of the 21st Amendment. The reason for that decision was that the organic law of the nation was altered by the adoption of that Amendment, so as to evacuate Congress of the power to enact legislation on the subject of national prohibition; the result being that there was no legislative capacity to be illuminated by Section 13 of Revised Statutes, and thus render valid prosecutions for Volstead law violations, subsequent to the adoption of the said Amendment.

That reasoning fails entirely in respect of this Joint Resolution. The capacity of Congress to legislate on the subject of an embargo has not been impaired by any agency whatever, and the fact that the Joint Resolution was brought to a close by the exercise of the power to "otherwise order" does not affect, in any respect, the legislative purpose which has been discussed.

The demurrer will be sustained upon the first ground and overruled upon the second and third. Settle order.

W. M. B., *U. S. D. J.*

[File endorsement omitted.]

47 In United States District Court, Southern District of New York

C 98–14

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, DEFENDANTS

(Opinion on Reargument)

April 6, 1936

Martin Conboy, Esq., and F. W. H. Adams, Esq., Special Assistants to the Attorney General, for the plaintiff.

George Z. Medalie, Esq., Attorney for defendants John S. Allard and Clarence W. Webster.

Supplemental opinion

Filed April 8, 1936

BYERS, *D. J.*: Reargument of this demurrer was had, as to the first ground, on March 31, 1936, at the instance of the government. The respects in which the opinion heretofore rendered is said to disclose a failure by the court to understand the issues may be briefly stated, thus:

(a) The delegation by Congress to the President was of the power to find a fact; it is not to be distinguished from the like author-
48 ity embodied in the Joint Resolution which was before the court in United States v. Chavez, 228 U. S. 525.

(b) This Joint Resolution is essentially similar to that of January 31, 1922, under which six presidential proclamations were issued. That resolution (22 U. S. C. §§ 236 and 237) is as follows:

"§ 236. Exportations of munitions of war restricted. Whenever the President finds that in any American country, or in any country in which the United States exercises extraterritorial jurisdiction, conditions of domestic violence exist, which are or may be promoted by the use of arms or munitions of war procured from the United States, and makes proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President prescribes, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress. (Jan. 31, 1922, c. 44, § 1, 42 Stat. 361.)

"§ 237. Penalty for exportation of munitions of war. Whoever exports any arms or munitions of war in violation of the preceding

section shall, on conviction, be punished by fine not exceeding $10,000, or by imprisonment not exceeding two years, or both. (Jan. 31, 1922, c. 44, § 2, 42 Stat. 361.)"

49 (c) The successful conduct of the foreign relations of this government requires that this demurrer be overruled.

As to the first of these, while the argument now presented is somewhat more analytical in form than upon the original hearing, the contentions are the same. They have been reexamined in deference to the importance of the subject, and to the earnest and forceful presentation in which they are submitted.

It is said that the intention of Congress is clear, that the United States should give aid to the reestablishment of peace between the belligerents to the Chaco dispute. So much cannot be debated.

Then, that the legislation prescribes a definite standard by which this intent is to be accomplished, "viz, the effect upon the reestablishment of peace of the prohibition of the sale of arms and munitions of war in the United States."

It will be assumed arguendo that the foregoing is a standard.

Finally, that "the fact left to the President to find was that the prohibition of the sale of arms in the United States had ability to contribute to the reestablishment of peace * * *."

50 These quotations from the brief will insure the statement of the government's position in precise form.

They probably mean that it was to be anticipated that the Presidential opinion would be formed as the result, in part at least, of an understanding of pertinent facts; it will be seen that the resolution makes no requirement concerning the basis of the conclusion which the President was authorized to reach, before rendering the law operative.

The contentions of the government disclose that, on May 28, 1934, the object to be accomplished lay in the future; that the standard—if such it was—that was to govern the process of coming to a conclusion could yield at best an opinion that, if certain transactions were forbidden, the interdiction would have ability (capacity) to contribute to the desired future result.

The argument does not avoid what is plainly seen, namely, that the translation of Congressional intent into operative legislation required not only information (which requirement may be inferred) but the holding of an opinion as to the capacity of the legislation to accomplish its avowed object; that requirement is stated in unmistakable terms.

In all cases which have been examined, the purposes or opinions of Congress have been embodied in the enabling legislation,

51 along with a formula for carrying them into effect, either (a) as to administrative details or (b) if or when a given state of facts is shown to exist.

Examples of these two classes of cases appear in the opinion heretofore rendered.

The Chavez case (supra) was discussed, and if the difference between a true finding of the existence of warfare "promoted by the use of arms, etc.", procured from the United States and that which is here called a finding (but which by its nature is an opinion or forecast) has not been demonstrated, further exposition of the subject would be of no avail.

The second consideration advanced has to do with the resolution quoted, of January 31, 1922. That was an amended form of the resolution involved in the Chavez case and was considered in connection with the first hearing. The amendments extended the scope of the legislation so as to embrace countries not originally comprehended, and added the words "or may be" after the word "are", referring to conditions of violence "which are or may be promoted by the use of arms", etc.

Apparently it is not argued that the second of these two changes was intended to import an element of futurity or of prospective scope to the subject-matter of the resolution. It is thought that the change indicated a purpose to authorize the issuance of a proclamation
52 in any case in which the conditions of domestic violence are perhaps promoted, etc., that is, upon a state of facts that might fall somewhat short of certainty.

In all material aspects, the 1922 resolution does not differ from that upon which the Chavez case was decided.

The third contention, concerning the conduct of foreign affairs, seeks to introduce an element which is not necessarily involved in this case. However labor-saving the device may be, of writing a criminal law into a Joint Resolution which deals primarily with matters of international relations, it is thought that the two subjects may not lend themselves conveniently to statutory amalgamation.

If an amendment to the Criminal Code had been adopted by Congress, to prohibit the making of contracts to sell arms and munitions in the United States, and it had contained a clause reading: "If the President shall find that this law will result in bringing about what Congress declares to be its purpose and shall so declare, then this law shall take effect on the date of his proclamation", probably the delegation of the power to perform an essentially legislative function would be so clear that there would be little room for dispute as to its presence.

It is not thought that a different situation is presented
53 because the instant penal provision appears as part of a Joint Resolution the major aspect of which may pertain to international affairs. If penalties of a criminal nature must be imbedded in such legislation in the interest of efficacy, care should be exercised to preserve constitutional amenities during the process of formulation.

The court has not been unmindful of the presumption of validity or constitutionality which attaches to all national legislation; it has not intended to do violence to the traditional practice of Congress

in reposing the widest discretion in the Executive Department of the government in the conduct of the delicate and nicely poised issues of international relations; it has merely been required to decide the issues raised by this demurrer, as a matter of everyday duty.

Settle order in accordance with the original opinion.

M. W. B., *U. S. D. J.*

[File endorsement omitted.]

54 In United States District Court

April 18, 1936

Present: Hon. Mortimer W. Byers, United States District Judge.

THE UNITED STATES OF AMERICA

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, DEFENDANTS

Judgment sustaining demurrers

Filed April 20, 1936

A demurrer having been filed herein on the 18th day of February 1936, on behalf of the defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc., to the first count of the indictment heretofore filed herein on the 27th day of January 1936, and a demurrer having been filed on the 18th day of February 1936, on behalf of the defendants Barr Shipping Corporation and Robert R. Barr to said first count of said indictment and a demurrer having been filed herein on said 18th day of February 1936, on behalf of the defendants John S. Allard and Clarence W. Webster to said first count of the said indictment and a demurrer having been filed herein on the 18th day of February 1936 on behalf of
55 the defendant Samuel J. Abelow to said first count of said indictment.

And the cause having come on to be heard on said demurrers on the 18th day of February 1936, and the Court having heard Chadbourne, Stanchfield, and Levy, Esqs. (Robert D. Shea, Esq., of counsel), in behalf of the defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc.; DeForest, Cullom, and Elder (Henry W. Steingarten, Esq., of counsel), in behalf of the defendants Barr Shipping Corporation and Robert R. Barr; George Z. Medalie, Esq., in behalf of the defendants John S. Allard and Clarence W. Webster; and J. Edward Lumbard, Jr., in behalf of the defendant Samuel J. Abelow in support of said demurrer, and having heard Martin Conboy, Esq., Special Assistant to the Attorney

General of the United States in opposition thereto, and having filed an opinion herein on the 24th day of March 1936, and the cause having come on for reargument on the 31st day of March 1936, and the Court having heard the aforesaid parties on such reargument in further support of and in further opposition to said demurrers respectively, and having filed a further opinion herein on the 8th day of April 1936,

Now, on motion of Chadbourne, Stanchfield & Levy, Esqs., in behalf of the defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc., and DeForest, Cullom, and Elder in behalf of the defendants Barr Shipping Corporation and Robert R. Barr, and George Z. Medalie, Esq., in behalf of the defendants John S. Allard and Clarence W. Webster, and J. Edward Lumbard, Jr., Esq., in behalf of the defendant Samuel J. Abelow, it is

56 Ordered that the said demurrers as to the first count of said indictment be and they hereby are sustained and that the first count of said indictment be and it hereby is dismissed.

(Sgd.) MORTIMER W. BYERS,
United States District Judge.

Notice of Settlement annexed.

57 In United States District Court

[Title omitted.]

Petition for appeal to the Supreme Court of the United States

Filed May 5, 1936

Comes the United States of America, plaintiff herein, and states that on the 20th day of April, 1936, demurrers of the defendants, Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr to the first count of the indictment herein were, by the court sustained, and the plaintiff feeling aggrieved at the ruling of said District court in sustaining said demurrers, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order and that a transcript of the record in this cause duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the court herewith a statement showing the basis and the jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
By (Signed) MARTIN CONBOY,
Special Assistant to the Attorney General of the United States.

[File endorsement omitted.]

59 In United States District Court

[Title omitted.]

Assignment of errors

Filed May 5, 1936

Comes now the United States of America by Martin Conboy, Special Assistant to the Attorney General of the United States, and avers that in the record proceedings and judgment herein there is manifest error, and against the just rights of said plaintiff in this, to wit:

1. That the court committed material error against plaintiff in sustaining the demurrers of the defendants Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow and Robert R. Barr, defendants, to the first count of the indictment.

2. That the court committed material error against plaintiff in sustaining said demurrers in holding that the Joint Resolution of May 28, 1934 (48 U. S. Statutes-at-Large, Part 1, p. 811) was invalid.

3. That the court committed material error against plaintiff in sustaining said demurrers in holding that the Presidential Proclamation of May 28, 1934 (48 U. S. Statutes-at-Large, Part 2, pp. 1744-5) made pursuant to the said Joint Resolution of May 28, 1934, was invalid.

4. That the court committed material error against plaintiff
60 in sustaining said demurrers in holding that the Joint Resolution of May 28, 1934 did not accomplish a valid delegation of legislative power to the President of the United States.

5. That the court committed material error against plaintiff in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, was an unconstitutional delegation by Congress of legislative power to the President of the United States.

6. That the court committed material error against plaintiff in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, embodied such an attempted abdication of legislative responsibility as to deprive it of constitutional validity.

7. That the court committed material error against plaintiff in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934 was unconstitutional.

Wherefore, for all of the above information appearing on the face of the record proceedings and judgment herein, plaintiff avers that material error was committed prejudicial to it in this cause and prays that the judgment of the District Court be reversed.

This the 5th day of May 1936.

(Signed) MARTIN CONBOY,
Special Assistant to the Attorney General of the United States.

[File endorsement omitted.]

61 In United States District Court

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed May 5, 1936

This cause having come on this day before the Court on the petition of the United States of America, plaintiff in the above entitled cause, praying an appeal to the Supreme Court of the United States for a reversal of the judgment herein sustaining demurrers of the defendants, Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr, to the first count of the indictment in said cause, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court of the United States, and the court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this court, it is therefore, by the Court

Ordered and adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this court in sustaining the demurrers of the

62 defendants, Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr, to the first count of the indictment to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court. It is further

Ordered that the United States of America be, and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal to the Supreme Court of the United States.

This the 5th day of May 1936.

MORTIMER W. BYERS,
District Judge

[File endoresment omitted.]

64 [Citation in usual form showing service on J. Edward Lumbard, Jr., et al., filed May 5, 1936, omitted in printing.]

66 [Clerk's Certificate to foregoing transcript omitted in printing.]

67 In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing.

Filed June 8, 1936

Pursuant to Rule 13, Par. 9 of this Court, the Appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

STANLEY REED,
Solicitor General.

68 Service of Statement of Points acknowledged June 5, 1936.

CHADBOURNE STANCHFIELDLY,
Counsel for Appellees, Curtiss-Wright Export Corp. & Curtiss Aeroplane & Motor Co.

Copy of above statement received June 5, 1936.

J. EDWARD LUMBARD, JR.,
Attorney for Defendant Abelow.

GEORGE Z. MEDALIE,
Attorney for Defendants Webster and Allard.

DEFOREST, CULLUM & ELDER,
Attorneys for Barr Shipping and R. R. Barr.

[File endorsement omitted.]

(Endorsement on cover:) File No. 40,638. S. New York, D. C. U. S. Term No. 98. The United States of America, appellant, vs. Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., and Barr Shipping Corporation, et al. Filed June 3, 1936. Term No. 98 O. T. 1936.

United States District Court for the Southern District of New York

No. C 98–14

UNITED STATES OF AMERICA

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, DEFENDANTS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the "Criminal Appeals Act", and by Section 345, Title 28, of the United States Code.

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B. The Statute of the United States, the validity of which is involved herein, is the Joint Resolution of the Congress of the United States, approved May 28, 1934 (48 U. S. Statutes-at-Large, Part 1, page 811) and the Presidential Proclamation issued thereunder on May 28, 1934 (48 U. S. Statutes-at-Large, Part 2, pages 1744 and 1745).

The Joint Resolution of May 28, 1934, is as follows:

JOINT RESOLUTION

To prohibit the sale of arms or munitions of war in the United States under certain conditions

RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in

the interest of either country, until otherwise ordered by the President or by Congress.

SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

Approved, May 28, 1934.

The Presidential Proclamation of May 28, 1934, is as follows:

SALE OF ARMS AND MUNITIONS OF WAR TO BOLIVIA AND PARAGUAY

By the President of the United States of America

A PROCLAMATION

WHEREAS section 1 of a joint resolution of Congress, entitled "Joint Resolution to prohibit the sale of arms or munitions of war in the United States under certain conditions", approved May 28, 1934, provides as follows:

"That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he

makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress."

AND WHEREAS it is provided by section 2 of the said joint resolution that—

"Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

NOW THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain

from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this twenty-eighth day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,

Secretary of State.

C. The date of the judgment of the district court sought to be reviewed is April 18, 1936 (entered

April 20, 1936), and the application for appeal was filed on May 5th, 1936, and is presented to the District Court herewith, to wit: On this 5th day of May 1936.

The indictment in this case is in two separate counts. The first count, which is the only count before the court on this appeal, charges a conspiracy to violate the foregoing Joint Resolution entitled "Joint Resolution to Prohibit the Sale of Arms and Munitions of War in the United States Under Certain Conditions" approved May 28, 1934 (48 U. S. Statutes-at-Large, Part 1, page 811), and the Presidential Proclamation of May 28, 1934 (48 U. S. Statutes-at-Large, Part 2, pages 1744 and 1745), in that the defendants conspired to sell in the United States arms, to wit, fifteen (15) machine guns to the country of Bolivia, one of the countries then and there engaged in armed conflict in the Chaco, in violation of the aforesaid Joint Resolution approved May 28, 1934, and the provisions of Presidential Proclamation issued May 28, 1934, by the President of the United States pursuant to the authority granted by Section One of the aforesaid Joint Resolution.

Demurrers to the first count of the indictment were filed on behalf of all the defendants.

By judgment dated April 18, 1936, and entered April 20, 1936, the court sustained the demurrers basing its judgment upon the invalidity of said statute to wit, the Joint Resolution of May 28,

1934, on which the first count of the indictment is founded.

The grounds of the court's decision are set forth in opinions filed March 24, 1936, and April 8, 1936.

The holding of invalidity of the Joint Resolution is that it constitutes an invalid delegation of legislative power by the Congress of the United States to the President.

The delegation of legislative power which the court holds is invalid is the authority given to the President to find "that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries."

The question presented is substantial in character. It involves not only the validity of the Joint Resolution of May 28, 1934, and the propriety of action taken thereunder, but the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose.

The decision appealed from is important, because if upheld it will operate to nullify in large part the laws enacted by Congress to preserve American neutrality among which are the Joint Resolution of January 31, 1922 (U. S. C. Title 22, Secs. 236–237), and the proclamation thereunder by Presidents Harding, Coolidge, and Hoover, as

well as Joint Resolution of August 31, 1935 (U. S. C. Title 22, Secs. 245a–245i), as amended by Joint Resolution of February 29, 1936.

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Doremus,* 249 U. S. 86;
United States v. *Sprague,* 282 U. S. 716;
United States v. *Chambers,* 291 U. S. 217;
United States v. *Keitel,* 211 U. S. 370;
United States v. *Hastings,* 296 U. S. 188.

Appended hereto is a copy of the opinion of the court filed March 24, 1936, and a copy of the supplementary opinion of the court filed April 8, 1936.

Respectfully submitted,

(Signed) MARTIN CONBOY,
Special Assistant to the Attorney General of the United States.

MAY 5TH, 1936.

Filed this day of May, 1936.

Clerk.

Deputy Clerk.

United States District Court for the Southern District of New York

C 98–14

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, DEFENDANTS

OPINION, MARCH 24, 1936

Martin Conboy, Esq., Special Assistant to the Attorney General, Attorney for the plaintiff (Martin Conboy, Esq., and Edward J. Ennis, and David W. Wainhouse, Esqs., Asst. U. S. Attorneys, of counsel).

Chadbourne, Stanchfield & Levy, Esqs., Attorneys for defendants Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc. (Robert D. Shea, Esq., of counsel).

De Forest, Cullen & Elder, Esqs., Attorneys for defendants Barr Shipping Corporation and Robert R. Barr (Henry W. Steingarten, Esq., of counsel).

George Z. Medalie, Esq., Attorney for defendants John S. Aliard and Clarence W. Webster.

J. Edward Lumbard, Jr., Esq., Attorney for defendant Samuel J. Abelow.

BYERS, D. J.:

The defendants have been indicted in this court for conspiring to violate the "Joint Resolution to Prohibit the Sale of Arms and Munitions of War in the United States under Certain Conditions", approved May 28, 1934, and the provisions of the Proclamation issued on May 28, 1934, by the President of the United States pursuant to authority provided in Section One of the Joint Resolution.

The indictment contains a second and substantive count, not presently involved.

The defendants have demurred to the conspiracy count because they object to facing a criminal charge for which they assert that there is no constitutional basis.

The duty of the court to inquire fully into the issues thus raised seems to pertain to the very essence of our present system of government.

Such was the procedure in *United States* v. *Chavez,* 228 U. S. 525.

The Joint Resolution of May 28, 1934, under which the prosecution is laid is as follows:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute

to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

The Proclamation bears the same date, and reads:

WHEREAS section 1 of a joint resolution of Congress, entitled "Joint Resolution To Prohibit the Sale of Arms or Munitions of War in the United States under Certain Conditions", approved May 28, 1934, provides as follows:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred on me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the

prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the Governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington this twenty-eighth day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,

Secretary of State.

The Proclamation of revocation is dated November 14, 1935, and so far as presently material is as follows:

WHEREAS by a Proclamation of the President issued on May 28, 1934, pursuant to a Joint Resolution of Congress approved by the President on the same date, it was declared that the prohibition of the sale of arms and munitions of war in the United States to those countries then engaged in armed conflict in the Chaco might contribute to the reestablishment of peace between those countries; and

WHEREAS by virtue of the Joint Resolution and the Proclamation above mentioned it became unlawful to sell arms or munitions of war to Bolivia or Paraguay; and

WHEREAS the Peace Conference in Plenary Session in Buenos Aires formally adopted on October 28, 1935, a Resolution declaring that the war between Bolivia and Paraguay had come to an end; * * *

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of

America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reestablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 14th day of November, in the year of our Lord nineteen hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,

Secretary of State.

The indictment as here involved charges the commission of three overt acts in pursuance of the alleged conspiracy, by three individual defendants and one corporate defendant, during July 1934; that is, during the period in which the Joint Resolution was said to be in force in virtue of the first Presidential Proclamation and before its stated revocation, by the second.

The objections urged in behalf of the demurrer are:

FIRST. That the Joint Resolution did not accomplish a valid delegation of legislative power to the Executive.

SECOND. That the Executive did not meet the requirements laid upon him by the terms of the Joint Resolution, in issuing his first Proclamation, and in consequence the latter was legally insufficient to render the former operative.

THIRD. That, in any case, prosecution for the alleged offenses could not be instituted after the effective date of the second proclamation, November 29, 1935, and hence this indictment which was found January 27, 1936, does not lie.

The first objection draws into question the concept which is embodied in the following words of the Joint Resolution:

> Resolved * * * That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged * * * may contribute to the reestablishment of

> peace between those countries, and if after consultation with the governments of other American Republic * * * he makes proclamation to that effect, it shall be unlawful to sell * * * until otherwise ordered by the President or by Congress; * * *

The argument runs, that Congress declares that the commission of a crime will result from the violation of a Joint Resolution, if that resolution is put into operation by the Executive, as the result of the exercise by him of an assumed capacity to forecast the probable result of so imparting vitality to the legislation.

It is said that this constitutes an attempt to substitute Executive determination, as to the probable future efficacy of a given law, for legislative judgment on the subject, and that the constitution confides no such function to other than the law-making department of our government.

The expression quoted employs the words "if the President finds" which would be appropriate to an existing, or to a past state of facts; in their legal sense, they cannot refer to future contingencies, i. e., that which "may contribute to" a desired result, if precision in the formulation of a criminal law is fairly to be required.

If accurate language had been employed, the resolution would have read something like this: "if the President shall be of the opinion that the reestablishment of peace is likely to result from the prohibition of the sale", etc., and for present pur-

poses the resolution must be construed as though it had been enacted in that form, for that is what it means.

The implication of such a formula would have been, that if the Executive should be of the opinion that the desired result was *not* likely to be accomplished by putting the Joint Resolution into effect, it would suffer stillbirth.

Examination of the question will proceed as though the legislative purpose had found expression in words appropriate to embody that which alone is implicit in the resolution.

The government asserts that there has been no "improper delegation of legislative authority to the Executive" because the resolution declares the policy of Congress and fixes the limits of the Executive policy. Reliance is had upon the following:

Hampton & Co. v. *U. S.*, 276 U. S. 394:

Here there was a review of a judgment of the United States Customs Court sustaining a rate of duty on imports, increased by presidential proclamation pursuant to authority conferred by Section 315, Title III of the Tariff Act of 1922. The statute authorized an increase in duties if the President after investigation "shall find it thereby shown (by the investigation) that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and pro-

claim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same."

In other words, the Executive was empowered to cause a mathematical calculation to be made, upon current data, as the basis for a true "finding", and to act in obedience to the result.

The opinion of the Supreme Court, upholding the delegation by Congress of its tariff making powers in such a restricted way, and according to so clear a formula, serves to bring into contrast that which was there found to be valid, and that which has here been attempted.

Avent v. *U. S.*, 266 U. S. 127:

This case, in upholding the denial of a motion in arrest of judgment in a criminal case, decides that Congress could delegate to the Interstate Commerce Commission the power to suspend its rules, and to issue orders giving priority and preference in the conduct of interstate commerce, and could make a violation of its rules a crime. The basis for such orders was the Transportation Act of 1920, which "authorizes the Interstate Commerce Commission, whenever it is of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it", etc.

This clearly delegated to the Commission the power to act with reference to an existing state of affairs which in its opinion required action to meet a present emergency. There was no effort to clothe the Commission with the power to act or to refrain from acting according to its opinion as to whether given legislative purpose "may contribute" to a future result.

U. S. v. *Grimaud,* 220 U. S. 506:

Here a demurrer to an indictment was overruled, in a case involving the use by the defendant of a portion of the national forest reserve, for the grazing of sheep, without procuring a permit from the Secretary of Agriculture, the issuance of such a permit was held to have been within the contemplation of Congress because the act creating the reserve provided for the ingress and egress of resident settlers complying with the rules and regulations covering such reservation; it declared that the Secretary should make such rules, and that any violation of the law itself "or such rules and regulations shall be punished."

The court declared that the delegation of administrative powers was necessary and valid; that the broad purposes of the law were established by Congress, and that the issuance of such a permit as the defendant had failed to procure was within the administrative competency of the Secretary.

In reaching this conclusion, the court quoted with approval the following language from the

opinion in *Marshall Field & Co.* v. *Clark,* 143 U. S. 649, at 694:

> The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.

The Aurora, 7 Cranch 382:

For a discussion of the issues involved in this case, and an understanding of the nature of the functions delegated by Congress to the Executive, reference should be had to the opinion in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 at 423.

Presently it may be said that the President was empowered to declare that France or Great Britain had revoked or modified edicts which were inimical to the United States, and if that fact were embodied in a Proclamation, the trade suspended by the Act of Congress and by the act laying an embargo, might be "renewed with the nation so doing."

The President was not authorized to hazard an opinion as to the probable effect, in the future, of certain legislation; he was empowered to establish a state of existing fact concerning governmental action which had been taken by a foreign power.

U. S. v. *Chavez,* 228 U. S. 525:

Here a decision sustaining a demurrer was reversed in a criminal cause in which the defend-

ant was charged with violating a joint resolution which made it a crime to export munitions of war; the indictment averred that the defendant made such "a shipment of said munitions of war from said city of El Paso and with said Ciudad Juarez in Mexico as the destination" from one part of El Paso to another. Apparently the court below had sustained the demurrer on the theory that export had not been completely alleged, because there was no averment that delivery in Mexico had been consummated. This view was rejected by the Supreme Court.

The rule of decision in that case does not touch the point of attack upon this demurrer, but the joint resolution of March 14, 1912, which was rendered operative by Presidential Proclamation is of great importance, thus:

> SECTION 1. That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President shall prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.
>
> SECTION 2. That any shipment of material hereby declared unlawful after such

> a proclamation shall be punishable by fine not exceeding ten thousand dollars, or by imprisonment not exceeding two years, or both.

The proclamation implementing the foregoing bore date of April 12, 1912.

It will be seen that the President was authorized to bring into operation a law, a violation of which would constitute a crime, as the result of finding an existing condition of facts, namely, domestic violence in another country, promoted by the use of arms procured from this country. The distinction between such a state of then existing fact, and what it was hoped, on May 28, 1934, "may contribute" to a future consummation, seems to be obvious.

The point of departure from the foregoing examples of a sanctioned delegation of power to declare a legislative purpose effective in the event that certain prescribed conditions are found to exist, which stands forth clearly in the subject-matter of this examination, is thought to be of an entirely practical and substantial nature.

If Congress had conducted a hearing in order to inform itself as to the probable effect of the proposed legislation, those who now stand at this bar, charged with the commission of crime because they did sell the interdicted implements in the ordinary course of business, might have been able to demonstrate to Congress that the reestablishment of peace, between the belligerents in the Chaco dis-

pute, would not be promoted by cutting off a supply of munitions of war from this country; that foreign sources of supply would still be available to the combatants, and that the purpose of the resolution would not come to fruition as the result of the contemplated embargo.

Had such process been employed, these defendants would have had an opportunity to submit their data for the information of Congress, and in aid of the essential legislative function of determining the probable effect of the contemplated measure. Instead, the Executive was empowered to make up the legislative mind as to the future efficacy of the law, as the reason for giving vitality to it (and apparently this was done without according a hearing to any one likely to be affected).

It is thought that the Joint Resolution embodied such an attempted abdication of legislative responsibility, as to deprive it of constitutional validity. Stated in lowest terms, it is conceived to be the duty of Congress alone to conclude whether a given law will work.

The defendants rely largely upon the decisions of the Supreme Court in the *Panama* case, supra, and in *A. L. A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, which involved broader delegations of legislative duty to the Executive department of the government, than are here presented. It is not thought that those decisions necessarily control the matter here examined, but that the dis-

tinction pointed out in the opinion in the latter case (*Schechter* v. *U. S.*, 295 U. S. 495, at 538) between a true finding of fact, and the formulation of an opinion concerning future probabilities, is such a recognition of the issue here presented, that this court is precluded from reaching any conclusion but that the first ground of demurrer is fatal to the indictment.

Upon the assumption that this conclusion is mistaken, there remain to consider the other objections to the indictment.

As to the argument that there was a failure by the President to consult with the governments of other American Republics, "and with their cooperation, as well as that of such other governments as he may deem necessary" take action as permitted (because the Proclamation bears the same date as the Joint Resolution, which means that the consultations could not have been had and the cooperation could not have been secured in so short a space of time) there is this to be said:

The proclamation recites the "finding" that the prohibition in question "may contribute to the reestablishment of peace" between the combatant countries, "and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution."

It is thought that this recital of what has been done precludes inquiry on the subject by the court.

The joint resolution does not require that the Proclamation shall recite the processes conducted by the Executive, which might lead to its issuance. The mere statement that the prescribed things have been done by the President which the Joint Resolution said were requisite to the issuance of the Proclamation, is conclusive for present purposes.

The defendants argue that there is a difference between the legislative specification and the Executive performance, namely, that the former was of actual cooperation by the governments of other American Republics, while what was obtained, according to the Proclamation, was the *assurance* of cooperation; and that this difference constitutes a fatal legal infirmity in the vitalizing Executive process.

The ready answer is that the President was not instructed as to the exact measure or manifestation of cooperation which he was expected to secure from other nations. An assurance of cooperation implies a meeting of the minds, and thus of itself constitutes the essential element of the specified requirement. It does not lie with this court to apply a more precise test. Congress was satisfied that the Proclamation was adequately supported, for the Joint Resolution was not altered, nor was its duration abbreviated by legislative action; therefore it would seem that this court may not with propriety inquire further into the subject.

This ground of demurrer is thought to be without support.

The third objection goes to the reservation contained in the second Proclamation to the effect that the revocation of the original Joint Resolution "shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred" during the effective period thereof.

The argument is, that this was the attempted exercise by the Executive of a purely legislative function, and that the President was not competent, in the legal sense, to keep alive the asserted criminal liability of these defendants.

Reliance is had upon the general principle stated for instance in *Yeaton* v. *U. S.*, 5 Cranch 281 (a forfeiture case for violation of the non-intercourse law of 1806), "that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by the statute." It is urged that only by legislative action could the right of prosecution be retained for alleged violation of this Joint Resolution while it was extant, and that the power to do this was not confided to the President, and if that was attempted, the delegation was without warrant in the constitution.

It is said that Section 13 Revised Statutes (1 U. S. C., Sec. 29) has no application. That provision is:

> Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

It is said that the word "repeal" was used in a precise sense, and was intended to mean the abrogation of one statute by another, and was not intended to accomplish the survival of liability to prosecution initiated after the expiration or termination of this Joint Resolution.

It will be observed that this argument attributes to Congress the initial purpose of forbidding the export to certain countries of munitions of war, during a period to be limited by the President or Congress; and the further purpose that immunity from prosecution for a violation of the embargo should arise upon the expiration thereof. Is this incongruity of intention plainly to be perceived?

To answer that question, requires an understanding of the law in response to which the quoted statute was enacted. It was stated in *Yeaton* v. *U. S., supra,* by Chief Justice Marshall, in a forfeiture cause in Admiralty based upon an alleged violation of the non-intercourse act of 1806 (an appeal having been presented after the expiration of the stat-

ute, and being deemed to constitute a hearing de novo):

> * * * a sentence of condemnation cannot be pronounced on account of a forfeiture which accrued under a law not in force at the time of pronouncing such sentence, unless by some statutory provision the right to enforce such forfeiture be preserved.

The foregoing is quoted from the "sentence" of the court and follows a statement of its opinion reading:

> * * * it has been long settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.

See also *The Irresistible,* 7 Wheat. 551, in which it is said by the same authority: "Now, it is well settled that an offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose."

United States v. *Tynen* (1871), 11 Wall. 88, decided that a criminal prosecution laid under a statute of 1813 having to do with offenses against the naturalization laws must be dismissed, because after the indictment had been demurred to in the Circuit Court, Congress passed a new statute which was approved in July 1870 covering the same sub-

ject and which was repugnant to the earlier statute and thereby accomplished its repeal, although in terms there was no such provision.

The repeal having been accomplished, prosecution under the old law could not be had.

Revised Statutes Section 13 was passed on February 25, 1871, eight days after the submission of the *Tynen* case to the court, and may be thought to have reflected a legislative purpose to avoid a repetition of the legal situation therein disclosed.

The statute dealt with the subject of "repeal", although the earlier cases above quoted referred to the expiration of temporary laws, as well as to the repeal of those of more permanent character.

Whether there is a distinction to be made concerning the necessity for preserving penalties, depending upon whether expiration or repeal is involved, may be laid aside for the moment. It is clear that the continuance of responsibility to answer a criminal charge under such circumstances is a matter of legislative concern. It pertains to the law-making power.

If survival of liability is asserted, it must proceed either from the silence of the repealing statute concerning immunity (by reason of Section 13 Revised Statutes) or from a direct and appropriate expression of the legislative purpose. It is not a subject for Executive pronouncement.

The most recent example of similar legislation with which the court is familiar is Joint Resolu-

tion 67 of the 74th Congress, approved August 31, 1935. It prohibits, among other things, the export of arms, etc., to belligerent countries. As amended February 29, 1936, it provides: "Whenever the President shall find that there exists a state of war between two or more foreign states" the prohibition shall become effective through Presidential proclamation; he is given the power to revoke when the described conditions have ceased to exist, in his judgment, and it continues:

> Except with respect to prosecutions (sic) committed or forfeitures incurred prior to March 1, 1936, this Section and all proclamations issued thereunder shall not be effective after February 29, 1936.

The foregoing was amended on the last-mentioned date to read

> Except with respect to offenses committed, or forfeitures incurred prior to May 1, 1937, this Section and all proclamations issued thereunder shall not be effective after May 1, 1937.

This is such an expression of legislative purpose, respecting the survival of liability beyond the duration of the resolution, as to remove the subject from the field of inquiry. It is compatible only with a recognition that the will of the legislative and not that of the Executive department of the government was involved in the law-making process.

The presence of such a provision in the Joint Resolution under examination, of course, would have avoided the issue now raised.

If the reasoning thus far is sound, it results that the proviso preserving beyond November 29, 1935, responsibility to answer for alleged violations committed while the law was in operation, was without effect, because it is part of a Presidential Proclamation and not of the Joint Resolution. It neither added to, nor subtracted from, the legal status of those charged with offending against the embargo. There seems to be nothing in the Joint Resolution delegating to the President the power or authority to assert the reservation stated in the proviso.

There remains to consider whether the omission by Congress to fortify the May 28, 1934, Joint Resolution, in respect of prosecution for offenses committed before its expiration, leads to the result asserted by the defendants.

When the resolution was under advisement, Congress contemplated that it would come to a termination at some future time, not as the result of the passage of an act of repeal, but in obedience to the self-contained formula of duration.

Congress was also aware of Section 13 of the Revised Statutes.

Commenting upon that law, the Supreme Court has said, in *Great Northern R. Co.* v. *U. S.*, 208 U. S. 452, at 465:

> * * * the provisions of Section 13 are to be treated as if incorporated in and as a

> part of the subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law, the section (Hepburn Act) must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of Sec. 13.

In formulating the Joint Resolution, Congress must be deemed to have considered that the necessity for preserving to the government the right to prosecute here asserted, had been anticipated by Section 13 of the Revised Statutes. A contrary view would not accord with the foregoing interpretation of the statute.

To recur to the argument of the defendants, that a repeal by statutory enactment differs from the expiration of a law intended to continue temporarily, it must be observed that no good reason is presented to support such a fancied distinction.

It is not thought that Congress entertained one purpose concerning offenses committed during the life of a statute having indefinite duration, and subject to termination by statutory repeal, and an opposite purpose, or no purpose, with respect to a law having a temporary existence which would come to an end as stated in its own terms. In both cases, it is the survival of re-

sponsibility for a violation, that is of the essence, and not the nature of the occasion upon which that survival rests.

It is therefore concluded that the absence of such a proviso, in the Joint Resolution under discussion, does not constrain the court to accept the defendants' views on this branch of the case.

It must be conceded that this conclusion may be thought to be impaired by the terms of Joint Resolution 67 of the 74th Congress, above-quoted. It may well be argued that Congress has therein written its own understanding of the necessity for the inclusion of such a reservation, and the force of the argument is not to be denied. It is presently preferred, however, to interpret the presence of that expression as manifesting choice rather than necessity, as something added from an abundance of caution and to preclude any question such as is here presented, rather than as a recognition that its absence would be fatal to a prosecution for an offense dating within, but laid beyond, the effective period.

The defendants rely principally on *U. S.* v. *Chambers,* 291 U. S. 217, in which it was decided that the Volstead law did not survive the adoption of the 21st Amendment. The reason for that decision was that the organic law of the nation was altered by the adoption of that Amendment, so as to evacuate Congress of the power to enact legislation on the subject of national prohibition; the

result being that there was no legislative capacity to be illuminated by Section 13 of Revised Statutes, and thus render valid prosecutions for Volstead law violations, subsequent to the adoption of the said Amendment.

That reasoning fails entirely in respect of this Joint Resolution. The capacity of Congress to legislate on the subject of an embargo has not been impaired by any agency whatever, and the fact that the Joint Resolution was brought to a close by the exercise of the power to "otherwise order" does not affect, in any respect, the legislative purpose which has been discussed.

The demurrer will be sustained upon the first ground and overruled upon the second and third. Settle order.

M. W. B.,
U. S. D. J.

United States District Court for the Southern District of New York

C 98–14

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, DEFENDANTS

OPINION ON REARGUMENT, APRIL 6, 1936

Martin Conboy, Esq., and F. W. H. Adams, Esq., Special Assistants to the Attorney General, for the plaintiff.

George Z. Medalie, Esq., Attorney for defendants John S. Allard and Clarence W. Webster.

BYERS, D. J.

Reargument of this demurrer was had, as to the first ground, on March 31, 1936, at the instance of the government.

The respects in which the opinion heretofore rendered is said to disclose a failure by the court

to understand the issues may be briefly stated, thus:

(a) The delegation by Congress to the President was of the power to find a fact; it is not to be distinguished from the like authority embodied in the Joint Resolution which was before the court in *United States* v. *Chavez*, 228 U. S. 525.

(b) This Joint Resolution is essentially similar to that of January 31, 1922, under which six presidential proclamations were issued. That resolution (22 U. S. C. Secs. 236 and 237) is as follows:

> SEC. 236. Exportations of munitions of war restricted. Whenever the President finds that in any American country, or in any country in which the United States exercises extraterritorial jurisdiction, conditions of domestic violence exist, which are or may be promoted by the use of arms or munitions of war procured from the United States, and makes proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President prescribes, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress (Jan. 31, 1922, c. 44, Sec. 1, 42 Stat. 361).
>
> SEC. 237. Penalty for exportation of munitions of war. Whoever exports any arms or munitions of war in violation of the preceding section shall, on conviction, be punished by fine not exceeding $10,000, or by imprisonment not exceeding two years, or

both (Jan. 31, 1922, c. 44, Sec. 2, 42 Stat. 361).

(c) The successful conduct of the foreign relations of this government requires that this demurrer be overruled.

As to the first of these, while the argument now presented is somewhat more analytical in form than upon the original hearing, the contentions are the same. They have been reexamined in deference to the importance of the subject and to the earnest and forceful presentation in which they are submitted.

It is said that the intention of Congress is clear, that the United States should give aid to the reestablishment of peace between the belligerents to the Chaco dispute. So much cannot be debated.

Then, that the legislation prescribes a definite standard by which this intent is to be accomplished, "viz, the effect upon the reestablishment of peace of the prohibition of the sale of arms and munitions of war in the United States."

It will be assumed *arguendo* that the foregoing is a standard.

Finally, that "the fact left to the President to find was that the prohibition of the sale of arms in the United States had ability to contribute to the reestablishment of peace * * *."

These quotations from the brief will insure the statement of the government's position in precise form.

They probably mean that it was to be anticipated that the Presidential opinion would be formed as the result, in part at least, of an understanding of pertinent facts; it will be seen that the resolution makes no requirement concerning the basis of the conclusion which the President was authorized to reach, before rendering the law operative.

The contentions of the government disclosed that, on May 28, 1934, the object to be accomplished lay in the future; that the standard—if such it was—that was to govern the process of coming to a conclusion, could yield at best an opinion that, if certain transactions were forbidden, the interdiction would have ability (capacity) to contribute to the desired future result.

The argument does not avoid what is plainly seen, namely, that the translation of Congressional intent, into operative legislation, required not only information (which requirement may be inferred) but the holding of an opinion as to the capacity of the legislation to accomplish its avowed object; that requirement is stated in unmistakable terms.

In all cases which have been examined, the purposes or opinions of Congress have been embodied in the enabling legislation, along with a formula for carrying them into effect, either (a) as to administrative details, or (b) if or when a given state of facts is shown to exist.

Examples of these two classes of cases appear in the opinion heretofore rendered.

The *Chavez* case (supra) was discussed, and if the difference between a true finding of the existence of warfare "promoted by the use of arms, etc.", procured from the United States, and that which is here called a finding (but which by its nature is an opinion or forecast), has not been demonstrated, further exposition of the subject would be of no avail.

The second consideration advanced has to do with the resolution quoted, of January 31, 1922. That was an amended form of the resolution involved in the *Chavez* case, and was considered in connection with the first hearing. The amendments extended the scope of the legislation so as to embrace countries not originally comprehended, and added the words "or may be" after the word "are", referring to conditions of violence "which are or may be promoted by the use of arms", etc.

Apparently it is not argued that the second of these two changes was intended to import an element of futurity, or of prospective scope to the subject-matter of the resolution. It is thought that the change indicated a purpose to authorize the issuance of a proclamation in any case in which the conditions of domestic violence are perhaps promoted, etc., that is, upon a state of facts that might fall somewhat short of certainty.

In all material aspects, the 1922 resolution does not differ from that upon which the *Chavez* case was decided.

The third contention, concerning the conduct of foreign affairs, seeks to introduce an element which is not necessarily involved in this case. However, labor-saving the device may be, of writing a criminal law into a Joint Resolution which deals primarily with matters of international relations, it is thought that the two subjects may not lend themselves conveniently to statutory amalgamation.

If an amendment to the Criminal Code had been adopted by Congress, to prohibit the making of contracts to sell arms and munitions in the United States, and it had contained a clause reading: "If the President shall find that this law will result in bringing about what Congress declares to be its purpose and shall so declare, then this law shall take effect on the date of his proclamation", probably the delegation of the power to perform an essentially legislative function would be so clear that there would be little room for dispute as to its presence.

It is not thought that a different situation is presented because the instant penal provision appears as part of a Joint Resolution the major aspect of which may pertain to international affairs. If penalties of a criminal nature must be imbedded in such legislation in the interest of efficacy, care should be exercised to preserve constitutional amenities during the process of formulation.

The court has not been unmindful of the presumption of validity or constitutionality which

attaches to all national legislation; it has not intended to do violence to the traditional practice of Congress in reposing the widest discretion in the Executive Department of the government in the conduct of the delicate and nicely poised issues of international relations; it has merely been required to decide the issues raised by this demurrer, as a matter of everyday duty.

Settle order in accordance with the original opinion.

M. W. B.
U. S. D. J.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 98

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court filed an opinion sustaining a demurrer to the indictment on March 25, 1936 (R. 11). After reargument the court filed a supplemental opinion on April 6, 1936 (R. 23). These opinions are reported in 14 F. Supp. 230.

JURISDICTION

The judgment of the District Court was entered on April 20, 1936 (R. 26). The appeal was prayed and allowed on May 5, 1936 (R. 27, 29).

The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682).

Probable jurisdiction was noted by this Court on October 12, 1936.

QUESTION PRESENTED

Whether the District Court erred in sustaining a demurrer to the first count of the indictment which charges a conspiracy to violate the Joint Resolution of the Congress of the United States entitled "Joint Resolution To prohibit the sale of arms and munitions of war in the United States under certain conditions", approved May 28, 1934 (48 Stat. 811), and the Presidential Proclamation issued thereunder on May 28, 1934 (48 Stat. 1744–45), on the ground that the Joint Resolution constitutes an improper delegation of legislative power to the President.

STATUTE INVOLVED

The Joint Resolution of May 28, 1934 (c. 365, 48 Stat. 811), is as follows:

JOINT RESOLUTION

To prohibit the sale of arms or munitions of war in the United States under certain conditions

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the

President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

Approved, May 28, 1934.

The two proclamations issued under this Resolution are set forth in the Appendix, *infra,* pp. 27–31.

STATEMENT

On January 27, 1936, the defendants were indicted in the United States District Court for the Southern District of New York (R. 3). The

indictment is in two separate counts. The first count, which is the only one here involved, charges that the defendants conspired to sell in the United States fifteen machine guns to Bolivia, one of the countries engaged in armed conflict in the Chaco, in violation of the Joint Resolution and the Presidential Proclamation of May 28, 1934 (R. 3).

The defendants demurred to this first count (R. 6–9). The District Court, by a judgment dated April 18, 1936, and entered April 20, 1936 (R. 20), sustained the demurrer. The judgment of the court was based upon the ground that the Joint Resolution constituted an improper delegation of legislative power to the President. The court also considered whether the executive, in issuing his proclamation, had met the requirements laid upon him by the terms of the Joint Resolution, and also whether prosecution for the alleged offenses could properly be instituted after the effective date of the second proclamation, dated November 14, 1935 (*infra*, p. 28), revoking the first. Both of these questions were resolved against the defendants.

SPECIFICATIONS OF ERRORS TO BE URGED

1. The District Court committed material error against plaintiff in sustaining the demurrers of the defendants Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., Barr Shipping Corporation, John S. Allard, Clarence W. Webster, Samuel J. Abelow, and Robert R. Barr, to the first count of the indictment.

2. The District Court committed material error against appellant in sustaining said demurrers in holding that the Joint Resolution of May 28, 1934 (48 Stat. 811), was invalid.

3. The District Court committed material error against appellant in sustaining said demurrers in holding that the Presidential Proclamation of May 28, 1934 (48 Stat. 1744–45), made pursuant to the said Joint Resolution of May 28, 1934, was invalid.

4. The District Court committed material error against appellant in sustaining said demurrers in holding that the Joint Resolution of May 28, 1934, did not accomplish a valid delegation of legislative power to the President of the United States.

5. The District Court committed material error against appellant in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, was an unconstitutional delegation by Congress of legislative power to the President of the United States.

6. The District Court committed material error against appellant in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, embodied such an attempted abdication of legislative responsibility as to deprive it of constitutional validity.

7. The District Court committed material error against appellant in sustaining said demurrers in holding that the said Joint Resolution of May 28, 1934, was unconstitutional.

101014—36——2

SUMMARY OF ARGUMENT

The Joint Resolution of May 28, 1934, does not constitute an unconstitutional delegation of legislative power to the President. From the beginning of the government similar delegations of power have been made in the field of foreign relations. Moreover, it meets the requirements for a proper delegation which has been laid down in the most recent cases. The policy of Congress is clearly stated, the standards are simple and definite, and a finding by the President is required. Clearly the present case is controlled by the decisions in *Hampton & Co.* v. *United States,* 276 U. S. 394, and *Field* v. *Clark,* 143 U. S. 649, both of which were likewise concerned with the conduct of foreign relations. There is no merit in the defendant's claim that the President is required to make simply an estimate of the future efficacy of the law. The argument rests upon a misconstruction of the Resolution, and, in any event, it is inconsistent with many decisions of this Court.

II

The two other grounds urged below by defendants in support of the demurrer, and overruled by the District Court, are not properly before this Court under the Criminal Appeals Act. In any event, they are without merit. By his proclamation the President clearly complied with every requirement of the Joint Resolution, making all findings of fact necessary. Nor did the proclamation

of November 14, 1935, revoking the former proclamation, terminate liability for offenses committed prior to the revocation. The prosecution is authorized by the Resolution, which has not been repealed. Moreover, even if the proclamation can be considered as a repeal of the Resolution, the prosecution is authorized by R. S. Section 13.

ARGUMENT

I

THE JOINT RESOLUTION OF MAY 28, 1934, DOES NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO THE PRESIDENT

A. HISTORICAL REVIEW OF CONGRESSIONAL RESOLUTION ON FOREIGN RELATIONS

From the beginning of the government, in the conduct of our foreign relations, Congress has followed the practice of conferring upon the President power similar to that conferred by the present Resolution. As early as March 26, 1794, embargoes were laid upon vessels in ports of the United States bound for foreign ports. 1 Stat. 400. See also Act of April 18, 1794, 1 Stat. 401. In that same year Congress first adopted the device of imposing upon the President the duty of determining when conditions had arisen requiring that an embargo should be applied. By the Act of June 4, 1794 (c. 41, 1 Stat. 372), authority was delegated to the President to lay an embargo, enforced by appropriate regulations, upon all ships in the ports of the

United States whenever, in his opinion, "the public safety shall so require". This precedent, it is to be noted, was adopted while many members of the Constitutional Convention sat in Congress.[1] That during the ensuing one hundred and forty years Congress has consistently entrusted the President with similar powers in a field "cognate to the conduct by him of the foreign relations of the Government",[2] is convincing evidence that the practice and acquiescence under it for so long a time reflect a valid exercise of legislative authority. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–473; *Field* v. *Clark*, 143 U. S. 649, 691.

While the Joint Resolution here in question is a direct outgrowth of the early embargo Acts, it is also substantially identical with a series of more recent Congressional enactments which have occupied an important place in our foreign policy. The Joint Resolution of March 14, 1912 (37 Stat. 630), provided for embargoes, with such exceptions as the President should prescribe, upon the exportation of arms or ammunition "whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by

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[1] It has frequently been pointed out that a contemporaneous legislative exposition of the Constitution, when its framers were actively participating in public affairs, is of great weight in determining its proper construction. *Myers* v. *United States*, 272 U. S. 52, 175; *Williams* v. *United States*, 289 U. S. 553, 573–574; *Knowlton* v. *Moore*, 178 U. S. 41, 56.

[2] See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422–425. where the statutory references and citations to pertinent Presidential proclamations are collected.

the use of arms or munitions of war procured from the United States."[3] By an amendment of 1922 (Joint Resolution of January 31, 1922; 42 Stat. 361) the resolution was amended to include, in addition, "any country in which the United States exercises extraterritorial jurisdiction", and the President's authority was broadened by authorizing him to include cases where conditions of domestic violence "are or may be" promoted by the use of munitions procured from the United States. As so amended, it is still in effect (U. S. C., Title 22, Secs. 236–237). Under its provisions proclamations have been issued prohibiting shipments of arms to Mexico (March 14, 1912, 37 Stat. 1733; October 19, 1915, 39 Stat. 1756; July 12, 1919, 41 Stat. 1762; and January 7, 1924, 43 Stat. 1934); to China (March 4, 1922, 42 Stat. 2264); to Honduras (March 22, 1924, 43 Stat. 1942; see also proclamation of May 15, 1924, 43 Stat. 1950); to Cuba (May 2, 1924, 43 Stat. 1946; June 29, 1934, 49 Stat. Proc. 1); to Nicaragua (September 15, 1926, 44 Stat. 2625); and to Brazil (October 22, 1930, 46 Stat. 3036).

[3] This resolution was an amendment of the Joint Resolution of April 22, 1898 (30 Stat. 739), which, probably as a conservation measure, authorized the President, "in his discretion, * * * to prohibit the export of coal or other material used in war * * *." A proclamation of October 14, 1905 (34 Stat. 3183), under this resolution, prohibited exportation of war material to Porto Rico and the Dominican Republic.

B. THE JOINT RESOLUTION IS CLEARLY SUSTAINED BY THE DECISION OF THIS COURT

An analysis of the Joint Resolution of May 28, 1934 (*supra*, pp. 2–3) shows that the power which it delegates to the President is less than that which has been approved in many previous decisions of this Court.

The Resolution (48 Stat. 811) prohibits (except under exceptions to be prescribed by the President, as to which no question has been raised), the sale of arms or munitions of war in the United States to those countries in conflict in the Chaco, if the President finds that such prohibition "may contribute to the reestablishment of peace between those countries", "and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect." The Resolution meets every test which this Court has established as requisites to a proper delegation of power. The Congressional policy is clearly declared, the standard is adequately defined, and a finding by the President is required in the exercise of his authority to enact the prohibition. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415; *Schechter Corp.* v. *United States*, 295 U. S. 495, 530.

Congress has clearly stated its policy; it wished to give the aid of the United States in reestablishing peace between the belligerents in the Chaco.

Congress has set up a definite standard upon which the President is to base his action: he must find that the prohibition of the sale of arms and munitions of war in the United States to the Chaco combatants may contribute to the reestablishment of peace between those countries.

The fact to be found by the President—whether prohibition of the sale of arms in this country may contribute to the reestablishment of peace in the Chaco—is not, as defendants have contended, a vague matter of opinion merely, upon which only a guess might be made. On the contrary, it is an eminently practical question depending upon facts which were peculiarly available to the President. Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1, 12. The state of the war, which might vary widely and rapidly, the number and type of purchases in this country by each side, and the sales if no prohibition were imposed, which would depend upon the financial condition of the belligerents, transportation facilities, and the like, were all factors which of necessity entered into his decision. Perhaps even more important was the fact of cooperation, which Congress had specifically required him to consider. This cooperation of other countries would be not only in similarly prohibiting sales to the combatants, but also is making effective the prohibition in this country by taking measures to insure that sales would not be

made to their citizens of arms ultimately destined for Bolivia and Paraguay.[4]

These subsidiary questions of fact, as well as many others which might be mentioned, could not, in practice, adequately have been made by Congress. Cf. *Hampton & Co.* v. *United States,* 276 U. S. 394. The Resolution, therefore, appropriately committed to the executive, in connection with the determination of the ultimate fact of the effect of the prohibition of sales of arms, the task of properly evaluating the constantly changing situation of the belligerents and the complex and varying attitudes of other nations as revealed by continuous diplomatic correspondence. Cf. *United States* v. *Chemical Foundation, supra,* at p. 12; *Douglas* v. *Noble,* 261 U. S. 165, 169; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 27.

In any event, the discretion is much less broad than that allowed the executive by other statutes which have been sustained by this Court. Section 3 of the Act of October 1, 1890 (26 Stat. 567, 612) provided that "whenever, and so often as the

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[4] The decision by the President as to the fact of this cooperation may be attacked by appellees as a further delegation of power. Assuming, *arguendo*, that the Resolution may be so construed, it is perfectly clear that this fact, which could be ascertained by Congress only with the greatest difficulty, and which may change rapidly from time to time, may properly be left to the determination of the President. See pp. ——, *infra*.

President shall be satisfied" that any country imposes duties on certain products which "he may deem to be reciprocally unequal and unreasonable", he might so proclaim and thereby suspend the operation of certain sections of the Tariff Act. The test there stated—"reciprocally unequal and unreasonable"—is obviously not susceptible of precise determination; much was left to the judgment of the executive. This Court, in *Field* v. *Clark,* 143 U. S. 649, held the delegation proper.

An even more striking illustration is contained in Section 315 of Title III of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 941). That section provides that whenever the President finds, with respect to articles produced both here and in other countries, "that the duties fixed in this Act do not equalize the * * * differences in costs of production in the United States and the principal competing country", he shall determine the differences and equalize them by changing the tariff classifications, provided that the change in rates is not more than 50 per cent. Determination of foreign and domestic costs of production is difficult in the extreme. Estimates enter largely into the calculations—estimates of the value of materials, some of which have no current market price, estimates of the amount of plant and other capital equipment consumed in the process of producing a unit of goods, estimates of the amount of labor and capital to be allocated

to each of several joint products, and the like.[5] In *Hampton & Co.* v. *United States,* 276 U. S. 394, the delegation was sustained. We submit that the present Resolution is clearly within the standards laid down in those cases. See also *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; *Tagg Bros.* v. *United States,* 280 U. S. 420; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Mahler* v. *Eby,* 264 U. S. 32; *Avent* v. *United States,* 266 U. S. 127; *Mutual Film Corp.* v. *Ohio Industrial Commission,* 236 U. S. 230; *United States* v. *Grimaud,* 220 U. S. 506; *Union Bridge Co.* v. *United States,* 204 U. S. 364. That it is a criminal statute which is brought into effect by the proclamation is, of course, no ground for objection. *United States* v. *Grimaud, supra.*

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[5] A special committee of the Senate has recently found that "costs are in the last analysis matters of opinion and are not susceptible of scientific determination." Report of Special Committee of the Senate on Investigation of the Munition Industry, S. Rep. No. 944, Part 2, 74th Cong., 1st Sess., p. 6. See especially pp. 19–24 (as to difficulties of valuation), pp. 27–36 (as to valuation difficulties in determining depreciation and similar cost items), and pp. 85–91. See also Testimony of Robert L. O'Brien, Chairman of the United States Tariff Commission, before the House Ways and Means Committee, Hearings on H. R. 8430, 73d Congress, 2d Session, pp. 72–76; John Day Larkin, *The President's Control of the Tariff* (1936), pp. 18–29, 67–78; W. H. Wynne, *A Tariff Commission at Work*, Journal of Canadian Bankers' Association, Vol. 33 (January and July, 1926), pp. 184, 195–197, 421, 423; T. W. Page, *Making the Tariff in the United States*, pp. 83–99.

One further factor adds to the present significance of *Field* v. *Clark* and the *Hampton* case. The tariff Acts there involved, like the resolution here, were inseparably related to the external relations of the United States. See also *The Aurora*, 7 Cranch 382. The Court has recently recognized, in reviewing the history of embargo legislation, that the delegation of the powers confided by such statutes to the President reflected a recognition that it was necessary to grant to the Executive "an authority which was cognate to the conduct by him of the foreign relations of the government." See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422.

Even more direct authority is supplied by *United States* v. *Chavez*, 228 U. S. 525, and *United States* v. *Mesa*, 228 U. S. 533, in which indictments based upon the Resolution of March 14, 1912 [6] (see p. 7, *supra*), were sustained. It is true that the constitutional question was not raised in those cases, but it is implicit in the decisions that the Resolution was constitutional. This conclusion is reinforced by the fact that in a later case, in which the Circuit Court of Appeals had specifically upheld the constitutionality of the Resolu-

[6] There is no essential difference between the facts to be found by the President under the Resolution of March 14, 1912, and under the Resolution in this case. In the former the President was given power to find that a condition of violence was promoted by the use of arms procured in this country. In the latter he is given power to find the reciprocal fact, that the prevention of the sale of arms has power to reestablish peace.

tion, a petition for certiorari was denied by this Court. *Talbott* v. *United States,* 208 Fed. 144 (C. C. A. 5th), certiorari denied, 232 U. S. 722. See also *United States* v. *Lucas,* 6 F. (2d) 327 (W. D. Wash.).

We submit, therefore, that the present Resolution complies in every respect with the requirements of *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495. Moreover, an analysis of those cases reveals that they provide no support for defendants' contention. In the *Panama* case, *supra,* Section 9 (c) of the National Industrial Recovery Act was held unconstitutional because it delegated to the President a completely unfettered discretion. The section stated merely that "The President is authorized to prohibit" the interstate or foreign shipment of oil produced in excess of state law or regulation. As the Court stated (p. 430):

> * * * Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

We have pointed out above that the Resolution here involved clearly indicates the policy which Congress desires to pursue, and sets up the standards which are to guide the action of the President.

A similar comment may be made with respect to the *Schechter* case, *supra.* Again the Court could

find no adequate standards by which the executive was to be guided, stating (pp. 541–542):

> Section 3 of the Recovery Act * * * supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. * * * the discretion of the President * * * is virtually unfettered.

C. THERE IS NO MERIT IN THE CLAIM THAT THE RESOLUTION INVALIDLY DELEGATES THE POWER TO DETERMINE FUTURE EFFICACY RATHER THAN PRESENT FACT

Defendants urge that insofar as the Resolution requires the President to find that an embargo "may contribute to the reestablishment of peace", he is allowed to make simply an estimate as to the future efficacy of the law, rather than a finding of present facts. The word "finding", they urge, cannot properly be applied to such a determination. The objection is equally applicable to the Joint Resolution of January 31, 1922 (on pp. 7–8), under which the shipment of arms is prohibited when the President finds that conditions "may" be promoted by the use of such arms and so makes proclamation. Two answers may, however, be made to the contention.

First, the argument rests upon a misinterpretation of the Resolution. It does not require, in any sense, the determination of what will be the facts

in the future. The President must find a fact presently existing at the time of proclamation, to wit, will the prohibition of the sale of arms *now* contribute to the reestablishment of peace in the Chaco *now*. The words "may contribute", upon which appellees and the lower court so strongly rely, are perfectly consistent with this interpretation. "Contribute" alone, may obviously refer to the present time, and "may" in the context of the Resolution, denotes simply present power or ability or potentiality of the prohibition of the sale of arms to contribute to the reestablishment of peace. See *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 411.

Moreover, any element of present determination of future effect which may be present in the function of the President is clearly not fatal to the validity of the Resolution, for it is not at all unusual. Rate-making bodies, for example, must determine not only value, which is largely dependent on future factors such as depreciation, obsolescence and continuation of the utility as a going concern, but must also estimate the future revenue which will result in order to determine whether the rates are confiscatory. Such delegations of power are, however, commonly upheld. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362. Whether continuation of or change in the present situation is most apt to be "in the public interest"

in the future has been held a proper basis for the exercise of delegated authority (see *New York Central Securities Co.* v. *United States*, 287 U. S. 12; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266); and likewise what regulations are presently necessary for the future protection of the public domain. *United States* v. *Grimaud*, 220 U. S. 506. The decisions of this Court clearly establish that the proper test, and the only test, of the validity of authority vested by Congress in the executive is the absence of a free and arbitrary discretion. *Schechter Corp.* v. *United States*, 295 U. S. 495, 538; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386–387; *Field* v. *Clark*, 143 U. S. 649, 692–693. We submit, therefore, that assignment to the President of the duty of determining whether the prohibition of the sale of arms has the power to contribute to the reestablishment of peace between the Chaco belligerents is not an invalid delegation but rather a proper assignment, to the department best fitted to determine it, if an ordinary question of present fact.

II

THE OTHER GROUNDS URGED BELOW IN SUPPORT OF THE DEMURRER ARE WITHOUT MERIT

In the District Court defendants advanced two further contentions in support of their demurrer to the first count of the indictment. They urged, first, that the President, in issuing his proclama-

tion, did not meet the requirements imposed upon him by the Resolution, and that consequently the proclamation did not bring the statute into effect. Secondly, they contended that the indictment does not lie because it was found on January 27, 1936, subsequent to the date upon which the President proclaimed the revocation of his first proclamation. Each of these grounds was held to be without merit by the court below, and in this conclusion we believe the decision of the lower court was clearly correct. Should the defendants attempt to obtain a review on this appeal of the decision below insofar as it relates to the unsustained grounds of demurrer, it is the position of the Government that this Court is without jurisdiction, under the Criminal Appeals Act.

A. QUESTIONS DECIDED AGAINST THE DEFENDANTS ARE NOT WITHIN THE JURISDICTION CONFERRED BY THE CRIMINAL APPEALS ACT.

The Criminal Appeals Act of March 2, 1907, *infra*, p. 30, provides for appeal "by and on behalf of the United States" from decisions holding an indictment bad, or arresting a judgment of conviction, because of the invalidity or construction of the statute upon which the indictment is founded, and also from decisions "sustaining a special plea in bar" when the defendant has not been placed in jeopardy.

Prior to the enactment of the Criminal Appeals Act, the Government had no opportunity to obtain

review of questions of law which were decided against it in the court of first instance. *United States* v. *Sanges,* 144 U. S. 310. The purpose of the Act was to remedy this situation, which often resulted in the inability to enforce a valid statute. The Act did not represent the judgment of Congress that the decisions specified were of such importance that immediate review by the Supreme Court was desirable, irrespective of which party obtained the decision below. Its sole purpose was to make appellate review possible "when the United States had been deprived of a remedy against wrongdoers." See House Rep. No. 2119, 59th Cong., 1st Sess.[7] See *United States* v. *Bitty,* 208 U. S. 393, 400; *United States* v. *Stevenson,* 215 U. S. 190, 195–196. Accordingly, the jurisdiction of this Court is limited to an appeal "taken by and on behalf of the United States." See *United States* v. *Bitty, supra,* 399–400; *United States* v. *Heinze,* 218 U. S. 532, 545–546. It seems plain that the jurisdiction of this Court does not extend to questions decided in favor of the United States, which may be reviewed in the normal manner after conviction.

The Act confers a special and limited jurisdiction, and the Court may not examine the whole case when a question has been appealed under this Act. *United States* v. *Keitel,* 211 U. S. 370, 398–399;

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[7] The other reports are silent as to the purpose of the enactment. Sen. Rep. No. 3922, 59th Cong., 1st Sess.; House Rep. No. 8113, 59th Cong., 2d Sess.

United States v. *Mason*, 213 U. S. 115, 122; *United States* v. *Mescall*, 215 U. S. 26, 31; *United States* v. *Kissel*, 218 U. S. 601, 606. It follows that the general rule, that any ground may be urged in support of the judgment below, *Langnes* v. *Green*, 282 U. S. 531, 537–538, is inapplicable to cases arising under this Act.

B. THE PROCLAMATION OF MAY 28, 1934, IS IN CONFORMITY WITH THE REQUIREMENTS OF THE JOINT RESOLUTION

Defendants urged below that the Proclamation of May 28, 1934, was not in conformity with the Joint Resolution for two reasons: (1) the language of the Proclamation does not follow the language of the Resolution, and (2) the Proclamation does not make a detailed statement of the findings upon which it is based, and that such findings as are stated could not, in fact, have been made.

The first contention is demonstrably without merit. The Proclamation declares that the President has "found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries." It also declares that the President has consulted with the governments of other American republics and has been assured of such cooperation as he has deemed necessary as contemplated by the Resolution. Certainly this is complete compliance with every re-

quirement for proclamation which the Resolution specifies.

Defendants' second point is also unsound. The President was not required to make lengthy and detailed findings of fact, stating the processes by which he had arrived at his conclusion. Unless the statute requires that further facts be found and stated by the executive officer (cf. *Mahler* v. *Eby*, 264 U. S. 32) the specific statement by the President, in the language of the statute, that he has found the facts which are prerequisite to his action, is sufficient. *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163; *Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 458; *Martin* v. *Mott*, 12 Wheat. 19, 31. The recent statement of the Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431–432, is not to the contrary. There the Act required no findings, and the question was whether, if it were to be construed as requiring the existence of certain circumstances and conditions upon the basis of which the President was to act, a statement by him of the existence of these facts was necessary. Here the President stated that he had found the facts upon which, under the Resolution, his action was to be based. Moreover, findings are of less importance in regulations which constitute general legislation than in administrative orders in the nature of judgments against particular individuals. See *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186.

In addition, it may be pointed out that defendants base their objection upon an erroneous interpretation of the facts. Their contention is that because the Resolution and the proclamation bear the same date, the President could not, in fact, have made the finding and consulted with other governments as the Resolution required. Actually, the President had, for some time prior to May 28, 1934, been in contact with other governments on this question and was no doubt well acquainted with the situation.[8] The Resolution certainly does not require that all the consultations be made anew after its passage. The information in the possession of the President at the time the Resolution was passed enabled him to put it into effect without delay.

C. THE PROCLAMATION OF NOVEMBER 14, 1935, REVOKING THE PROCLAMATION OF MAY 28, 1934, DID NOT TERMINATE LIABILITY FOR OFFENSES COMMITTED PRIOR TO SUCH REVOCATION

Defendants urged below that the revocation of the Proclamation of May 28, 1934, by the Proclamation of November 14, 1935 (*infra*, pp. 28–30) effectively terminated all liability for acts done while the first proclamation was in effect. The argument rests upon the rule that in the absence of a competent saving clause, no proceedings can be

[8] See Senate Rept. No. 1153, 73d Congress, 2d Session, p. 2; *The Chaco Arms Embargo*, Report by the American Committee in Geneva to the Special Senate Committee Investigating the Munitions Industry, 74th Congress, 2d Session, pp. 7–8.

had under a statute which has been repealed or has otherwise expired. *United States* v. *Chambers*, 291 U. S. 217; *United States* v. *Tynen*, 11 Wall. 88; *Yeaton* v. *United States*, 5 Cranch 281. The general saving clause contained in Section 13 of the Revised Statutes (U. S. C., Title 1, Sec. 29) is said to be inapplicable.

The rule may be freely admitted, but it is wholly inapposite here. It is based upon the principle that one can not be punished when authority to inflict that punishment no longer exists: *The Irresistible*, 7 Wheat. 551; *United States* v. *Chambers*, *supra*, pp. 222–223. Here the revocation of the original proclamation did not end authority to inflict punishment for prior violations of the statute. Revocation of the proclamation on November 14, 1935, removed one of the prerequisites essential to liability for similar acts in the future, so that it was no longer unlawful to make such sales, but the revocation obviously did not repeal the Resolution. The Act of Congress still remains in full force, and by Section 2 authorizes and prescribes the punishment for any violations of it which may have been committed. If defendants are found to have done acts illegal under Section 1, they may still be punished under the authority of Section 2.

Appellees may urge that the statute expired when the Proclamation of May 28, 1934, was revoked by the Proclamation of November 14, 1935. We believe that the above analysis clearly reveals that the statute did not expire, but in any event the

point is without merit. By R. S. Section 13 Congress has provided a general saving clause designed to avoid further difficulties such as those which arose in *United States* v. *Tynen* and *Yeaton* v. *United States, supra.* That section constitutes ample authority for the present prosecution. *Great Northern Ry Co.* v. *United States,* 208 U. S. 452. It is unnecessary to discuss whether any force should be ascribed to the saving clause in the revoking Proclamation of November 14, 1935.

CONCLUSION

Wherefore, it is submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to overrule the demurrer.

Respectfully submitted.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
MARTIN CONBOY,
F. W. H. ADAMS,
Special Assistants to the Attorney General.
WILLIAM W. BARRON,
CHARLES A. HORSKY,
Attorneys.

OCTOBER 1936.

APPENDIX

The Presidential Proclamation of May 28, 1934 (48 Stat. 1744–1745), is as follows:

SALE OF ARMS AND MUNITIONS OF WAR TO BOLIVIA AND PARAGUAY

By the President of the United States of America

A PROCLAMATION

WHEREAS section 1 of a joint resolution of Congress entitled "Joint Resolution To prohibit the sale of arms or munitions of war in the United States under certain conditions", approved May 28, 1934, provides as follows:

"That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or

to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress."

AND WHEREAS it is provided by section 2 of the said joint resolution that—

"Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial

and punishment any offenders against the same.

And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this twenty-eighth day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,

Secretary of State.

The Presidential Proclamation of November 14, 1935, No. 2147, is as follows:

SALE OF ARMS AND MUNITIONS TO BOLIVIA AND PARAGUAY

By the President of the United States of America

A PROCLAMATION

WHEREAS by a Proclamation of the President issued on May 28, 1934, pursuant to a Joint Resolution of Congress approved by the President on the same date, it was declared that the prohibition of the sale of arms and munitions of war in the United States to those countries then engaged in armed conflict in the Chaco might contribute

to the reestablishment of peace between those countries; and

WHEREAS by virtue of the Joint Resolution and the Proclamation above mentioned it became unlawful to sell arms or munitions of war to Bolivia or Paraguay; and

WHEREAS the Peace Conference in Plenary Session in Buenos Aires formally adopted on October 28, 1935, a Resolution declaring that the war between Bolivia and Paraguay had come to an end; * * *

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reestablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 14th day of November, in the year of our Lord nineteen hundred and thirty-five, and of the

Independence of the United States of America the one hundred and sixtieth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:
CORDELL HULL,
Secretary of State.

Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended; U. S. C., Title 18, Sec. 682:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES, JOHN S. ALLARD, CLARENCE W. WEBSTER AND SAMUEL J. ABELOW.

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OPINIONS BELOW

The Court below rendered an opinion (R. 11) and on reargument a supplemental opinion (R. 23). They are reported in 14 F. Supp. 230.

STATUTE INVOLVED

The Statute involved is the Joint Resolution of May 28, 1934 (c. 365, 48 Stat. 811). It is in the following terms:

"JOINT RESOLUTION

To prohibit the sale of arms or munitions of war in the United States under certain conditions

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

Approved, May 28, 1934."

The two proclamations issued under this Resolution are set forth in the Appendix to the Appellant's Brief, at 27-31.

SUMMARY OF THE ARGUMENT

I

The Joint Resolution of May 28, 1934, invalidly delegates legislative power to the Executive in at least four respects. First, its going into operation is made dependent upon the President's determination whether it may have the capacity to bring about the result desired by the Congress, to wit, the re-establishment of peace in the Chaco. Second, its

going into operation is further conditioned upon the President's uncontrolled discretion. Third, it delegates to the President a power to repeal the Resolution which is coordinate with that of the Congress itself. Fourth, it grants to the President the power to except from and limit the statutory prohibition, as he may see fit, guided by no rule or standard whatsoever. In each of these respects it attemps to delegate to the Executive a function which must, under the Constitution, be exercised by the Congress itself.

II

The Presidential Proclamation which was designed to put the Resolution into operation was ineffectual, because of the President's failure to find essential jurisdictional facts.

III

The acts charged in the indictment are no longer an offense against the laws of the United States. The prosecution is not saved by R. S. Section 13 and there is no other saving clause. The prosecution must therefore fail.

IV

This Court may consider all grounds urged in support of the judgment which go to the validity or construction of the Joint Resolution.

ARGUMENT.

POINT I

THE JOINT RESOLUTION OF MAY 28, 1934, CONSTITUTES AN INVALID DELEGATION OF LEGISLATIVE POWER TO THE EXECUTIVE.

The first section of the Joint Resolution of May 28, 1934, provides as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

In enacting this Joint Resolution, the Congress delegated to the President not less than four of its essential legislative functions.

1. The going into operation of the statute was conditioned upon the President's judgment as to its beneficial effect upon the restoration of peace in the Chaco . . . "* * * if the President finds that the prohibition of the sale of arms to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries * * *". The Congress thus attempted to substitute the President's judgment for its own.

2. The going into operation of the state was further conditioned upon an exercise of the President's unfettered discretion, i.e., the making of a proclamation which he was left free to make or not to make as he saw fit . . . "* * * and if * * * he makes proclamation to that effect * * *". The

Congress thus attempted to substitute the President's will for its own.

3. The going out of operation of the statute was also conditioned upon an exercise of the President's unfettered discretion, the making of a proclamation which he was left free to make whenever and for whatever reasons he saw fit . . . "* * * it shall be unlawful * * * until otherwise ordered by the President or by Congress." The Congress thus attempted to delegate to the President a power of repeal coordinate with its own.

4. While the statute should be in operation, the President was given the power, controlled by no standard, to except from and to limit its operation in particular cases and as to particular persons . . . "* * * it shall be unlawful * * * except under such limitations and exceptions as the President prescribes * * *". This was administrative delegation, to whose validity the provision of a standard is essential.

The Joint Resolution, considered as a whole, amounts to an abdication by the Congress of its essential functions which is almost complete, since in each of the four respects outlined above the Congress has attempted to delegate to the executive its essential functions. In neither of the opinions rendered below did the Court notice any but the first-mentioned of them; we apprehend, however, that the Government will not contend that in passing upon the question whether the Joint Resolution invalidly delegates legislative power this Court must close its eyes to all but the particular phrase in the Joint Resolution which the Court below found objectionable.

A. The Congress cannot, under the constitution, delegate to the Executive its function of making laws which may affect our foreign relations.

The Government contends, in effect, that Congress can delegate to the Executive, without restriction, its legislative functions with respect to laws which may affect our relations with foreign nations; the Government's contention necessarily goes to this length, since it relies upon certain early statutes purporting to grant to the President the power, *in his sole discretion*, to put into effect or to suspend the operation of laws prohibiting commercial intercourse with the then warring nations of Europe. (Act of June 4, 1794, c. 41, 1 Stat. 372; Act of June 13, 1798, c. 53, 1 Stat. 565; Act of Feb. 9, 1799, c. 2, 1 Stat. 613; Act of Feb. 27, 1800, c. 10, 2 Stat. 7; Act of April 22, 1808, c. 52, 2 Stat. 490.)

As this Court has pointed out, these statutes "were not the subject of judicial decision." (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422.) All of them were enacted in times of great national stress, when the Congress and the Executive alike are prone to disregard the limitations which Constitution imposes upon them. All of them antedated the decision in *The Aurora* (7 Cranch 382).

The Aurora involved a libel for forfeiture under the Non-Intercourse Act of May 1, 1810 (c. 39, 2 Stat. 605). The going into operation of this statute was conditioned upon the revocation by either Great Britain or France, but not by both of those nations, of certain of their edicts, which were violative of the neutral rights of the United States, it being provided that the happening of this event should be declared by proclamation of the President. This was urged by the claimant in *The Aurora* to amount to a delegation of legislative power to the President. Although the Act of May

1, 1810, like the earlier statutes upon which the Government here relies, bore directly upon our foreign relations, counsel for the United States did not urge that the legislative function of making such laws could be delegated to the President, nor did this Court so decide. The statute was upheld on the sole ground that it was true conditional legislation, dependent solely upon the happening of a definite event, the repeal of certain hostile edicts of foreign nations, and granting no power to the President but merely devolving upon him the duty of finding whether the condition had been fulfilled.

It would thus seem that even at this early date it was not supposed that in this field the Congress possessed an unlimited power of delegation, and this Court has so viewed the matter in later cases.

Field v. *Clark*, 143 U. S. 649;

Hampton & Co. v. *United States*, 276 U. S. 394.

Nor is the Government's contention well-founded that "during the ensuing one hundred and forty years Congress has consistently entrusted the President with similar powers in a field 'cognate to the conduct by him of the foreign relations of the Government' ". With three exceptions, the first of which was preceded by an interval of approximately ninety years, all of the legislative precedents relied upon by the Government were instances of true conditional legislation, i.e., legislation which is to become operative upon the happening of a prescribed event, the task of finding whether or not this event has happened being devolved upon the Executive.

The exceptions are (1) The Joint Resolution of April 22, 1898 (30 Stat. 739), adopted originally as a war measure (as to this see 30 Stat. 364 and also 30 Stat. 738), authorizing

the President in his discretion to prohibit the export of coal or other material used in war; (2) The Joint Resolution of March 14, 1912 (37 Stat. 630) amendatory thereof; and (3) The Joint Resolution of January 31, 1922 (42 Stat. 361) further amendatory thereof.

Proclamations were from time to time issued under these Resolutions, undoubtedly on the assumption that they were valid legislation. This view may have been largely due to a belief that their validity had been established by the decisions of this Court in *United States* v. *Chavez* (228 U. S. 525) and *United States* v. *Mesa* (228 U. S. 533).[1] The constitutional question was not raised, however, in either *United States* v. *Chavez* or *United States* v. *Mesa*, and in neither of these cases were argument had or briefs filed on behalf of the respondents. The Government urges, nevertheless, that "it is implicit in the decisions that the Resolution was constitutional'. Of a like contention, this Court said, in *Webster* v. *Fall* (266 U. S. 507, at p. 511): "The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New* v. *Oklahoma*, 195 U. S. 252, 256; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 119; *United States* v. *More*, 3 Cr. 159, 172; *The Edward*, 1 Wheat. 261, 275-276." Moreover, where constitutional issues are in-

[1] Those decisions were so construed in *Talbott* v. *United States* (208 Fed. 144) and *United States* v. *Lucas* (6 F. (2d) 327).

volved, this Court is not bound even by its decisions rendered after full presentation and deliberation.[2]

Legal Tender Cases, 12 Wall. 457.

We submit that neither these early Statutes nor these recent Resolutions are sufficient of themselves to establish that the separation of powers under the Constitution may be disregarded in this field. They fail to evidence that continued practice and continued acquiescence, which, in the words of the Government's brief (Appellant's Brief, p. 8) reflect a valid exercise of legislative authority. Action under the Resolutions has, in large part, been based upon decisions of this Court which have been taken as establishing their validity, although in those cases the question of their constitutionality was neither argued nor considered, and could not, if the Government's contentions here be well-founded, have been either argued or considered. In each instance, the delegation attempted was identical with that attempted in section 9(c) of the National Industrial Recovery Act (48 Stat. 200), held invalid in *Panama Refining Co.* v. *Ryan* (293 U. S. 388). Unless that decision has no application to legislation which may affect our foreign relations, they cannot be regarded as

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[2] It is noteworthy, moreover, that this contention of the Government is not consistent with the position which it has taken as to the scope of review under the Criminal Appeals Act (34 Stat. 1246, 18 U. S. C. Sec. 682). *United States* v. *Chavez* and *United States* v. *Mesa* were appeals by the United States under that Act from adverse holdings as to the construction of the word "export" in the Joint Resolution of March 14, 1912. If the position taken by the Government (Appellant's Brief pp. 20-22) were sound (which we do not assert or admit to be the case, see *Talbott* v. *United States,* 208 Fed. 144, *United States* v. *Lucas,* 6 F. (2d) 327), the validity of the Joint Resolution of 1912 could not have been passed upon by this Court in either of those cases.

valid precedents for the present legislation. There is nothing in the Constitution which affords any basis for the contention that the power to make laws which may affect our foreign relations may be vested in the Executive instead of in the Congress.

B. The Joint Resolution of May 28, 1934 involves a delegation of essentially legislative functions to the Executive.

1. *The Joint Resolution invalidly delegates legislative power to the Executive, in that its going into operation is made contingent upon the President's determination of a question of legislative policy.*

The Court below held the statute invalid on the ground that the judgment of an executive or administrative officer as to the capacity of legislation to accomplish its avowed object is not a condition upon which its going into operation can constitutionally be made dependent.

By the Joint Resolution, the President is authorized to put the prohibition of the sale of arms and munitions into effect if he concludes that such prohibition may help to re-establish peace in the Chaco. Whether or not a law forbidding the sale of arms is a suitable means by which to bring about this result, the Congress has not undertaken to decide; it has left the decision of this question entirely to the Executive. The statutory inhibition could become operative if, but only if, the President should be of opinion that it might accomplish the desired result, the expediency and just operation of the proposed legislation thus being left entirely to his determination. (See *Field* v. *Clark*, 143 U. S. 649, 693). It is of the essence of the legislative function to determine whether a proposed scheme of laws may tend to bring about a desired result. In the Joint Resolution, the Congress has attempted to transfer to the President the function of making this determination.

By our Constitution, the national legislative power is entrusted to the Congress; essential legislative functions can no more be delegated to the President than to any other grantee (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at p. 420).

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, §1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, §8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." [3]

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[3] See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at p. 421.

The distinction which is here pointed out, between *conditional legislation* and *administrative delegation* is fundamental. In administering a general statute, it may be necessary to apply it to a host of different individual cases, for all of which it would obviously be impracticable for the Congress to make particular provisions. In such cases, moreover, the danger that the separation of powers which underlies our system of Government may be broken down is relatively insignificant, since the Congress itself has put the law into operation. Neither of these considerations apply in the case of conditional legislation.

Most of the cases upon which the Government relies in its brief involve only administrative delegation.

Field v. *Clark*, (143 U. S. 649) involved a suit for refund of duties claimed to have been illegally exacted under the Tariff Act of 1890 (c. 1244, 26 Stat. 567). The principal contention advanced on behalf of the plaintiffs was that the Act as a whole was invalid. One of the grounds of invalidity urged was that legislative powers were delegated to the Executive by section (3) of that Act. Section (3) was not directly involved in the suit, but this Court passed upon its validity, without determining whether or not it was inseparable from the remainder of the Act.

Section (3) provided as follows:

> "That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricul-

> tural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country * * * " at specified rates.

Although in *Field* v. *Clark* this provision was upheld as *conditional legislation*, on the authority of *The Aurora* (7 Cranch, 382), this Court has recognized in later cases that it involved *administrative delegation*, the function exercised being essentially that of rate making (see *Hampton & Co.* v. *United States*, 276 U. S. 394, at pp. 409-410). The Act itself was already in operation, and the task entrusted to the Executive was the application of its reciprocal provisions in particular instances. From this point of view, the reciprocal provisions of the Tariff Act of 1890 seem indistinguishable from the flexible provisions considered in *Hampton & Co.* v. *United States*.

It is apparent that the determination which under Section (3) was to be made by the Executive was more than a mere finding of fact. We believe, accordingly, that, considered as *conditional legislation*, Section (3) was properly characterized in the concurring opinion in *Field* v. *Clark* as extending " * * * to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department." (143 U. S. 649, at p. 699). But although

the executive was required to evaluate an existing situation in the light of a somewhat vague and indefinite standard, it was not required to determine any question of legislative policy, nor to determine what consequences might be expected to follow from the enactment of a given statute or upon a given course of action. Even from this point of view *Field* v. *Clark* thus affords no precedent for the delegation involved in this Joint Resolution.[4] It follows *a fortiori* that statutes which by their express terms are to become operative upon the happening of certain *events* whose existence as *facts* are to be found by the President or other executive officers (*The Aurora*, 7 Cranch, 382) likewise afford no precedent for the Joint Resolution.

The remaining cases relied on by the Government clearly involved only administrative delegation. Of these cases the following involved the making of subsidiary determinations of fact, in applying a general statutory rule in particular instances:

Jacobson v. *Massachusetts*, 197 U. S. 11;

Union Bridge Co. v. *United States*, 204 U. S. 364;

Mutual Film Corp. v. *Ohio Industrial Comm.*, 236 U. S. 230;

Douglas v. *Noble*, 261 U. S. 165;

Mahler v. *Eby*, 264 U. S. 32;

New York Central Securities Co. v. *United States*, 287 U. S. 12;

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[4] If we believed otherwise, we should be prepared to urge that this Court reconsider its ruling in *Field* v. *Clark*, particularly in view of the fact that what was there said as to the validity of section (3) of the Tariff Act of 1890 might be regarded as unnecessary to the decision of the cause.

Federal Radio Commission v. *Nelson Bros., Co.*, 289 U. S. 266.

United States v. *Grimaud* (220 U. S. 506) involved the making of subsidiary rules to fill in the details of a general statutory scheme and the following cases involved the exercise of the analogous functions of rate-making:

Reagan v. *Farmers' L. & T. Co.*, 154 U. S. 362;

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1;

Louisville & Nashville R. R. Co. v. *Garrett*, 231 U. S. 298;

Hampton & Co. v. *United States*, 276 U. S. 394;

Tagg Bros. v. *United States*, 280 U. S. 420.

There is no case in this Court which upholds a delegation such as that which we are now considering. On the other hand, there is no case in this Court which directly holds such a delegation invalid.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the Congress had attempted to authorize the employment of a specified means to attain any end the President deemed desirable. In *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, the Congress attempted to authorize the employment of any means the President deemed suitable to carry out a declared policy. In the present case, the question is for the first time directly presented to this Court whether the operation of a statute can constitutionally be made dependent upon the judgment of an executive or administrative officer as to whether a definitely specified scheme of legislation is a suitable means of accomplishing a desired end.

The Government contends that such a judgment is in essence no more than a finding of all of the complex facts

upon which it would have to be based. We may assume that the Resolution calls for a rational judgment based upon a consideration of such factors, among others, as the Government here enumerates (Appellant's brief p. 11). The Congress might be expected to consider these factors, among others, in making up its mind whether prohibition of the sale of arms was a suitable means by which to bring about the re-establishment of peace in the Chaco. The Congress might therefore be expected to seek advice and information as to such matters from the President and the Department of State, and to take these factors into account in making up its mind whether the proposed legislation would prove effective. The President, also, might be expected to take them into account in determining whether or not to approve the proposed legislation. These and other relevant factors would be, however, only bricks and mortar, essential in arriving at a rational decision but not of themselves determining what that decision shall be; the making of such a judgment amounts to more than merely finding all the facts upon which it as a rational judgment must be based. A determination by the Executive as to whether a given statute may have a tendency to bring about a desired result involves, consequently, not only the determination of a question or questions of fact, but in addition the formation of an opinion as to a matter of essential legislative policy. Conditioning the statute upon such a determination is in effect conditioning it upon the executive discretion as to its wisdom.

See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, at pp. 416-418;

Schechter Corp. v. *United States,* 295 U. S. 495 at p. 538;

Butler v. *United States,* 78 F. (2d) 1, at p. 7 (aff'd on other grounds, 297 U. S. 1).

We believe that these cases have clearly established the principle that, beyond the zone of mere administrative authorization, essential legislative functions may not be delegated. If this be the true rule, it follows that the Congress may not, under the guise of conditional legislation, make the operation of its statutes contingent upon a "finding" which is, to paraphrase the language of this Court in *A. L. A. Schechter Poultry Corp.* v. *United States* (295 U. S. 495 at p. 538), but a statement of an opinion as to the general effect upon the promotion of the cause of peace between Bolivia and Paraguay of a scheme of laws. To determine whether proposed legislation has the ability to aid in the accomplishment of an avowed object of the Congress is, we submit, of the very essence of the legislative function.

The Government in effect urges, however, that the delegation to the President would be in substance no narrower if the question to be determined by him were what result might be expected to follow if sales of munitions in the United States to Bolivia and Paraguay were to cease and that, accordingly, the Resolution should be read as if it so provided.

Such a delegation would have been substantially narrower, since it would have removed from the President's consideration all questions as to the effectiveness of the statute but it would, nevertheless, have been a delegation to the Executive of essential legislative functions, since the going into operation of the statute would have still been left to rest in the discretion of an executive officer, not effectively controlled.

If the Joint Resolution so rewritten, would have been a valid exercise of legislative power and the President's proclamation in pursuance thereof constitutionally capable of making it operative, then any Act or Joint Resolution modeled upon it will be equally valid and effective in any

field of legislation. Nor need the power which it delegates be vested in the President. In this connection, it is not possible to distinguish between the President and any other grantee. (See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at page 421.)

If this were valid legislation, the President or any other executive officer might be given an equal discretion with respect to the operation of any or all of the laws of the United States. Any such law might provide: That it should go into operation of the President or any other officer should conclude that it (or its enforcement or compliance with it) might contribute to the accomplishment of an avowed object of the Congress and if the President (or any other executive officer) should make proclamation to that effect; that while in operation, it should be subject to such exceptions as the President (or any other executive officer) might see fit to prescribe; that it should remain in effect until such time as the President (or any other executive officer) might see fit otherwise to order.

Even within the broad field of legislation which might directly affect our foreign relations, there would, in the Government's theory, exist room for vesting in the Executive a like discretion with respect to many subjects of legislation diverse in their character and some at least fraught with consequences of great moment. If this legislation, having as its avowed object the reestablishment of peace between foreign belligerents, is valid, so also would be similar legislation having any other avowed object. If this legislation delegating congressional power to regulate foreign commerce is valid, so also would be legislation delegating any other of the enumerated powers of Congress, at least so long as the exercise of the power delegated might have a logical connection with the object in view.

The very legislation which is now under review could have delegated the power of the Congress to declare war, without raising any different questions or bringing any different principles into play. General legislation by its terms applying not to one but to a host of differing possible future conflicts might in like manner delegate to the President the power to declare war if in his opinion intervention by the United States on one side or the other of the conflict might contribute the re-establishment of peace between the warring nations.

The Government argues that the finding contemplated by the Joint Resolution is not a matter of opinion merely, but that on the contrary it is an eminently practical question depending upon facts peculiarly available to the President and involving many subsidiary questions of fact which "could not, in practice, adequately have been made (sic) by Congress". (Appellant's Brief, pp. 11-12). The Government, recognizing that this is not all that the legislation commits to the President for his determination, frankly admits that it includes "the determination of the ultimate fact of the *effect* of the prohibition of the sale of arms", and "properly evaluating the constantly changing situation of the belligerents" (Appellant's Brief, page 12). It is then contended that the Resolution clearly indicates the policy which Congress desires to pursue and sets up the standards which are to guide the action of the President (Appellant's Brief p. 14).

If the Government's contention is sound, it is clear that the cases supposed would also involve a determination by the President of (1) the ultimate fact of the effect of armed intervention by the United States, and (2) the evaluation of the constantly changing situation of the belligerents, etc. That this involves opinion and judgment cannot be doubted.

The Government's position must be that a conclusion as to what results will or may follow upon a given course of action, although necessarily involving opinion and judgment, is nevertheless a finding as to an existing state of fact. It is our position that an opinion or appraisal of future effects, when related to action, is a determination of policy and that this is exclusively the function of Congress.[5]

The test must be pragmatic and not dialectic. In the cases supposed, it was the President and not Congress who decided whether this country should go to war. In the case of other statutes which might be patterned after the Joint Resolution, it would be equally the President and not Congress who would decide whether given conduct should or should not be unlawful. It was never intended that Congress should by any device delegate this power to the President by making the law dependent upon his judgment in any respect. The prohibition against unwarranted delegations to the President can make no distinction between legislation generally on the one hand and legislation which may affect our foreign relations on the other, or among legislation which regulates interstate trade and commerce, legislation which regulates foreign commerce, legislation which imposes taxes, or legislation which declares a state of war to exist. All are equally subject to the same standards and the same limitations.

It is no answer to say that the Congress could not be expected so to abdicate its functions or that it must be assumed that any power so delegated would be wisely employed. It is precisely to guard against the danger of such an abdication that the legislative power was confided to the

---

[5] The evaluation of the constantly changing situation of the belligerents and of other like factors, although supposedly based on facts, is equally a matter of opinion and judgment.

Congress instead of to the Executive, even though it can be more conveniently and more effectively employed by the Executive.

2. The Joint Resolution invalidly delegates legislative power to the Executive in other respects, not made the basis of the decision below.

A. The Joint Resolution unlawfully delegates legislative power to the Executive, in that it attempts to make its going into operation contingent upon the will of the President.

The statute provides that it shall go into operation "if * * * the President makes proclamation to that effect" (i.e., to the effect that the other conditions to the vesting of the legislation have been fulfilled). His discretion is not entirely unfettered; the statute cannot go into operation unless all the other conditions have been fulfilled; but even if all have been fulfilled, he is under no duty to issue his proclamation unless he so desires. The Congress, in enacting legislation, may provide that it shall go into operation immediately or at a future date. So also it may provide that it shall go into operation upon the happening of some event, and may devolve upon an executive or administrative officer the duty of determining when that event has happened. (*The Aurora*, 7 Cranch. 382). The mere expression of the will of an executive or administrative officer is not, however, a contingency upon which the vesting of conditional legislation may lawfully depend.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

That is the contingency here.

B. The Joint Resolution unlawfully delegates legislative power to the Executive, in that it attempts to give to the President a power of repeal coordinate with that of the Congress itself.

The provision that the Statute shall remain in operation "until otherwise ordered by the President or by Congress"

is a conditional repeal of the Statute, to take effect if the President declares that to be his will. The going out of operation of the statute is thus made dependent solely on the will of the President, which may not be done under the Constitution.

Panama Refining Co. v. *Ryan,* 293 U. S. 388.

C. The Joint Resolution unlawfully delegates legislative power to the Executive, in that it attempts to give to the President the power to prescribe exceptions and limitations in his unfettered discretion.

In essence, the power to prescribe exceptions is a power to license sales. The power to prescribe limitations may be of the same character, or may have been directed to the making of subsidiary rules and regulations. Both of these are delegations of the power to administer the law after it goes into operation, not to put the law into operation. As instances of administrative delegation, they would have both been unexceptionable, if only a standard had been set up for the President's guidance. In this field, the standard set up need not be very definite.

Mutual Film Corp. v. *Ohio Industrial Comm.,* 236 U. S. 230;

Douglas v. *Noble,* 261 U. S. 165;

N. Y. Central Securities Co. v. *United States,* 287 U. S. 12;

Radio Comm. v. *Nelson Bros. Co.,* 289 U. S. 266;

United States v. *Grimaud,* 220 U. S. 506.

It has never been doubted, however, that the absence of any standard whatever must prove fatal to the delegation since if the administrative officers upon whom the power is devolved are to set up their own standard, they must legis-

late and if they are to abide by no standard, the matter will be determined by their mere arbitrary whim and caprice. If even an indefinite standard, as, for example, the public interest, had been provided, that might be read in the light of the legislative policy and so be made definite; but here the matter is expressly left to the President's unfettered discretion.

POINT II.

THE JOINT RESOLUTION OF MAY 28, 1934, NEVER BECAME OPERATIVE, BECAUSE OF THE PRESIDENT'S FAILURE TO PROCLAIM HIS COMPLIANCE WITH ITS REQUIREMENTS.

Before he could put the Joint Resolution into operation the President was required:

(1) To consult with the governments of other American Republics,

(2) To secure their cooperation, and

(3) To secure the cooperation of such other governments as he might deem necessary.

It was, accordingly, essential to the effectiveness of the President's proclamation that it declare explicitly that he had fulfilled these requirements.

> *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at pp. 431-433.

What he did declare was that he had consulted with governments of other American Republics and that he had been assured of the cooperation of such governments as he had deemed necessary as contemplated by the Joint Resolution. He did not declare that he had been assured of the cooperation of any other American Republic.

POINT III.

THE PROSECUTION MUST FAIL, BECAUSE THE ACTS CHARGED NO LONGER CONSTITUTE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

It is the general rule that when by reason of a change in the law the acts charged in an indictment cease to constitute an offense, the prosecution must fail unless there is some particular provision of law to save it.

The Irresistible, 7 Wheat. 551;

Yeaton v. *United States*, 5 Cr. 281;

United States v. *Tynen*, 11 Wall. 88;

United States v. *Chambers*, 291 U. S. 217.

Section 13 of the Revised Statutes is not such a provision, since there was here no repealing statute to which it, as a rule of construction, might apply.

POINT IV.

THIS COURT MAY CONSIDER ANY OBJECTION WHICH MAY BE URGED AGAINST THE VALIDITY OF THE JOINT RESOLUTION, WHETHER OR NOT IT WAS DECIDED ADVERSELY TO THE GOVERNMENT IN THE DISTRICT COURT.

The Court has frequently decided that under the Criminal Appeals Act it must accept the construction placed upon the indictment in the court below and will not consider questions going merely to the sufficiency of the indictment as a pleading.

United States v. *Keitel*, 211 U. S. 370;

United States v. *Mason*, 213 U. S. 115;

United States v. *Mescall*, 215 U. S. 26;

United States v. *Kissel*, 218 U. S. 601.

This Court has never intimated, however, that it will not consider any contention falling within the scope of the Criminal Appeals Act which may be urged in support of the judgment. (*Cf. Langnes* v. *Green*, 282 U. S. 531.) On the contrary this Court has, in a number of cases, considered questions which were not ruled adversely to the Government in the Court below. (*United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Shreveport Grain Co.*, 287 U. S. 677). These cases cannot, it is true, be regarded as precedents, since the contention presently urged by the Government was not presented or considered in them, but the very fact that this contention is now brought forward for the first time, almost thirty years after the enactment of the Criminal Appeals Act, is persuasive as to the proper construction of that statute.

CONCLUSION.

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

GEORGE Z. MEDALIE,
Attorney for Appellees John S. Allard and Clarence W. Webster.

Theodore S. Hope, Jr.

J. EDWARD LUMBARD, JR.,
Attorney for Appellee Samuel J. Abelow.

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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES, CURTISS-WRIGHT EXPORT CORPORATION AND CURTISS AEROPLANE & MOTOR COMPANY, INC.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 98

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES, CURTISS-WRIGHT EXPORT CORPORATION AND CURTISS AEROPLANE & MOTOR COMPANY, INC.

STATEMENT

Appealing (under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, Government's Brief, p. 31), the Government asks review of a judgment of the District Court, for the Southern District of New York, rendered on April 20, 1936, sustaining demurrers of various defendants to, and dismissing the first count of, a two-count indictment, filed on January 27, 1936. The District Court filed an opinion in support of such judgment on March 25, 1936 (R. 11), and a supplemental opinion on April 6, 1936 (R. 23). These opinions are reported in 14 F. Supp. 230.

The first count only is before this Court. It charges criminal conspiracy (under Section 37 of the Criminal Code), to sell machine guns to Bolivia, in violation of Section 1 of a Joint Resolution of Congress, approved May 28, 1934 (c. 365, 48 Stat. 811, Government's Brief, pp. 2-3), and of the provisions of a Presidential Proclamation thereunder, made on the same day (48 Stat. 1744-1745, Government's Brief, pp. 27-29).

The time of the alleged conspiracy was laid as between May 29, 1934 ~~to~~ and some unknown date later than September 28, 1934. (R. 3).

On November 14, 1935, by a second Proclamation (No. 2147, Government's Brief, pp. 29-31), the President declared:

> "I have found that the prohibition * * * will no longer be necessary as a contribution to the reestablishment of peace" etc.,

and he revoked that prohibition from and after November 29, adding this proviso: *

> "That this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation * * * of May 28, 1934, or the Joint Resolution * * * approved * * * on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The objections urged under the demurrers (Opinion, R. pp. 13, 14, 18) may be stated thus:

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* It closely follows the wording of §13, R. S.

1. The provision of the Joint Resolution, attempting to empower the President to determine whether the prohibition of the sale of arms in the United States to the warring countries may contribute to the reestablishment of peace, was an unlawful delegation of legislative power.

2. The Joint Resolution never went into operation because the President's Proclamation did not contain all the findings prescribed by the Joint Resolution.

3. The count shows on its face that the President could not have consulted other governments as contemplated by the Resolution.

4. The second Proclamation of November 14, 1935, operated to extinguish the alleged liability.

The demurrers were sustained upon the first ground only.

SUMMARY OF ARGUMENT

I.

Under the Criminal Appeals Act, this Court may consider upon this appeal any point making against the validity of the Joint Resolution. The Government's contention that this Court's review is confined solely to the specific point upon which the district Court based its decision that the Joint Resolution was invalid, finds no support in the Act or in the decisions of this Court; and, if accepted, would defeat the purpose of the Act, which is to secure from this Court instruction for the district courts as to the validity and meaning of the particular statute upon which the indictment is based.

II.

The Joint Resolution is invalid because its going into operation depended upon the President's making an optional proclamation, which the President might never make. The Resolution imposed on the President no duty to make a proclamation but left his discretion in this regard unfettered. The authority here conferred to make or to refuse to make a law is essentially a legislative function which may not be delegated or surrendered by the Congress.

III.

By the same principle, the Joint Resolution is invalid for the further reason that its duration, if ever it went into operation, was likewise left to the uncontrolled discretion of the President. The President was left free to bring the law to an end whenever he wanted to. But the making an end of a law is as much a legislative act as is making the law in the first instance.

IV.

Again, the power granted to the President to prescribe limitations and exceptions to the prohibition likewise invalidates the Joint Resolution. This power is similarly a legislative power, and the Joint Resolution has entirely failed to set any bounds or guides for the President's exercise thereof.

V.

The sale of arms never became unlawful because the President failed to comply with the conditions prescribed by the

Joint Resolution. The President's proclamation does not declare that he had secured the co-operation of *any* American Republic, as required by the Joint Resolution. Even if the language of the proclamation could be construed to amount to a general statement to the effect that the conditions had been complied with, this would not suffice. In exercising a delegated power the President is required to state affirmatively his compliance with the terms governing the use of that power and indicate the details of his compliance.

VI.

The Joint Resolution is not presently valid or alive for the purpose of sustaining prosecution for offenses heretofore committed thereunder. The Joint Resolution expired and became inoperative with the issuance of the revoking proclamation on November 14, 1935, and no further proceedings can be had to enforce it, unless competent authority has kept the Joint Resolution alive for that purpose. The provision of the revoking proclamation was not such competent authority; and Section 13, R. S. does not apply because (*a*) the Joint Resolution was not *repealed;* and (*b*) it is not a *particular* provision of law for the purpose of continuing a *temporary* measure.

ARGUMENT

I

UPON THIS APPEAL, THIS COURT MAY CONSIDER ANY POINT MAKING AGAINST THE VALIDITY OF THE JOINT RESOLUTION.

Because the District Court based its decision of invalidity upon *one only* of three grounds urged upon it (R. 22), the Government here argues that the Criminal Appeals Act

(Chap. 2564, 34 Stat. 1246, as amended—copied in its brief, p. 31), does not permit consideration on this appeal of any ground of invalidity other than the single one upon which the Court below sustained the demurrers (Government's Brief, p. 21).

As in this brief we purpose to urge and argue that the Joint Resolution of May 28, 1934, was manifestly invalid on other grounds, we desire in the outset to convince this Court of our right so to do.

In answer to the Government's narrow reading of the Appeals Act, we say:

(1) Such a reading is erroneous.

(2) This Court has furnished precedents for a broader reading, and

(3) The narrow reading has no support of authority.

The Government's Narrow Reading Is Erroneous:

The Act, so far as here pertinent, permits an appeal by the Government from a decision or judgment of the District Court in a criminal case, sustaining a demurrer to any indictment, or any part thereof

> "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

In its Statement of Jurisdiction the Government correctly stated that the judgment sustaining respondents' demurrers as to the first count of he indictment, *was based upon the invalidity of the Joint Resolution upon which the indictment was founded.*

In *United States* v. *Bitty,* 208 U. S. 398, 400, speaking generally, this Court said:

"Hence, that there might be no unnecessary delay in the administration of the criminal law and *that the courts of original jurisdiction may be instructed as to the validity* and meaning of the particular statute sought to be enforced, the above Act of 1907 was passed." *

In *United States* v. *Biggs*, 211 U. S. 507, this Court said (p. 522):

"* * *The power given is consistent with the purpose for which it was conferred; that is, to have determined, in a case within the statute, the question whether or not the Government is entitled to further prosecute the case.* * *"

In *United States* v. *Keitel*, 211 U. S. 370, the Court said (p. 398):

"* * the purpose of the statute" (Criminal Appeals Act) "was to give the United States the right to seek a review of decisions of the lower court concerning the *subjects embraced within the clauses of the statute*, and not to open here the whole case."

The "subjects" thus referred to are those specified by the Criminal Appeals Act, namely the validity or construction of the statute on which the indictment was founded. That this is so is made plain by this Court in *United States* v. *Kissel*, 218 U. S. 606, cited also by the Government (its brief p. 22). In following the *Keitel* case this Court declared (p. 606):

"That this court is confined to a consideration of the *grounds of decision mentioned in the statute*, when an

* Unless otherwise stated, all italics are ours.

indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399."

The Act nowhere provides, nor has this Court ever held that it must confine its consideration to the *specific point* upon which the District Court based its judgment of invalidity, or disregard other points fatal to validity.

We submit that the objects thus sought may not be fully attained, unless, on a single appeal, this Court may hear and determine any and every question going to the validity of the statute held invalid by the District Court. It cannot be achieved by considering one objection of several urged below on one appeal, and other objections in further stages of the cause, should the case be remanded. Instructions as to validity should not be given piecemeal or little by little.

The inadequacy of such a narrow reading can best be appreciated by considering its consequences.

In the first place, in any case where, as here, three objections to validity were urged upon the Court below, that Court, (under the Government's reading of the Appeals Act), could control the extent of review in this Court. For, by basing its decision solely on *one* of the three grounds, and either disregarding the other two, or holding them to be insufficient, the District Court could narrow the inquiry on appeal to the particular one so selected by it.

In such event, if this Court felt that particular ground was not well taken, it would be obliged to remand for further proceedings, even though it felt certain that one or both of the other objections were fatal to the validity of the statute.

When the case again reached the lower court, the other objections could be renewed. Possibly the reasoning in

briefs filed here, might persuade the lower court that its original view of one or the other of the objections was erroneous. Or it might come to that view upon a reargument before it, in which event it would sustain the demurrers upon one of the other grounds, and the Government would again appeal, and even on the second appeal, one only of the other objections would be up for review in this Court. This would be so, although all three of the objections to validity had always inhered in the situation.

Or, upon remand, after plea, and preparation for trial, the case might go to trial and verdict. If the verdict were against the defendants, they could appeal to the proper appellate court; with the certainty that, if either of their original additional objections was well founded, the prosecution must ultimately fail.

Any one of those three original objections, going to the invalidity of the indictment, if sustained below, would have warranted an appeal in the first instance. Or if the District Court had based its decision on all three, all three could be considered here on the single appeal. We think the Government itself would concede this much. It cannot be that the view of the District Court as to any one of the three objections should operate (on an appeal under the Act) to exclude consideration, by this Court either of it or of any other objection, aimed at the invalidity of the statute.

Within the field in which appeals are allowed under the Criminal Appeals Act, judgments properly appealed from are subject to the rules governing review on appeals in general. There is nothing in the language of the Act that operates to exempt such appeals from those rules. The general rule has been stated by this Court in *United States v. American Railway Express Company*, 265 U. S. 425, 435, as follows:

> *"But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree, any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked, or ignored by it."*

In *Langnes* v. *Green*, 282 U. S. 531, this Court in applying this rule, said (p. 538):

> "Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. *His right to do so is beyond successful challenge,* quite apart from the fact that this is a proceeding in admiralty, and is here from an intermediate appellate court."

We are not urging that, to defeat this appeal, we may advance every contention that might defeat the indictment. The *Hastings* case, 296 U. S. 188, rightly declared that where the court below has rested its decision not solely upon the invalidity or construction of the statute, but has also sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency, an appeal, otherwise permissible, must be dismissed, because, whatever the views of this Court on the questions reviewable, the judgment below would have to be sustained on the ground not here reviewable.

E converso, if the questions to be urged are those, and those only, that would be the subject of review under the Act had the Court below based its decision thereon, the right to consider and determine them is not lost merely because the lower Court disregarded or refused to uphold them. Only

by allowing ~~true~~ due consideration of all thereof upon a single appeal may the full purpose of the Appeals Act be accomplished, and the validity of the statute involved be fully determined, once and for all.

This Court Itself Has Given a Broader Meaning to the Criminal Appeals Act.

On appeals under the Act, this Court has often refused to consider questions not involving the validity or construction of the statute under which the prosecution was had. But we have not found a case in which it refused to consider a question affecting the validity of such a statute, merely because that question was not the precise ground upon which the Court below rested its decision. On the contrary, we have found several cases in which this Court has considered such other questions.

In *United States* v. *Nixon,* 235 U. S. 231, this Court reversed a memorandum decision (apparently not reported) of the District Court for the Western District of Missouri, sustaining a demurrer to an indictment as not charging any offense for which the defendants (receivers of a railroad) could be held. The charge was that the receivers had unlawfully transported cattle without compliance with the rules established by the Secretary of Agriculture. The lower court treated the indictment as founded on the Quarantine Act of 1905 (33 Stat. 164), and correctly held that such act did not apply to receivers.

This Court reversed on the ground that the Act of March 4, 1913, (c. 145, 37 Stat. 823, 831), had extended the 1905 Act so as to make it applicable to receivers. The existence of such 1913 Act had not even been brought to the attention of the lower court. The Court indicated the contention before it as follows:

"And it is contended that, inasmuch as the Criminal Appeals Act only authorized a review of a decision in so far as it was 'based upon the * * * construction of the statute upon which the indictment was founded' * * * the correct ruling that receivers are not within the Act of 1905, ought not to be reversed because it now appears that they were within the terms of the Act of 1913, which was not brought to the attention of the District Judge, and was not therefore construed by him in fact."

Of that contention this Court said (pp. 235, 236):

"within the meaning of the Criminal Appeals Act * * * the statute on which, as matter of law an indictment is founded, may be misconstrued not only by misinterpreting its language, but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms.

* * *

In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act (34 Stat. 1246). If that were not so, the right of the government could in any case be defeated by entering a general order of dismissal, without referring to the statute which was involved or without giving the reasons on which the decision was based."

In *United States* v. *Shreveport Grain Co.*, 287 U. S. 77, this Court reversed a judgment of the District Court (46 Fed. (2d) 354), sustaining a demurrer grounded on the invalidity of the statute on which the indictment was based. In reaching its conclusion, this Court considered one con-

tention as to invalidity which, so far as the decision of the court below discloses, was not relied on by that court.

The indictment charged misbranding of certain sacks of corn bran (in violation of the Pure Food and Drugs Act of June 30, 1906), as containing "100 lbs. net", whereas in truth each contained a lesser quantity. Paragraph 3 of Section 8 of that Act provided that an article should be deemed misbranded if it was in package form, and the quantity of the contents was not marked on the package, with the following proviso:

> "Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages, shall be established by rules and regulations made in accordance with the provisions of section three of this Act."

In sustaining the demurrer the lower court held that the above proviso made it necessary to read Section 8 as prohibiting only *unreasonable* variations in weight, and that the test thereby indicated was so indefinite that it failed to fix any ascertainable standard of guilt, or afford a valid definition of crime, and that the statute was therefore unconstitutional under the Sixth Amendment. This question involved a construction of the Pure Food and Drugs Act.

In reversing, this Court considered not only the ground so relied on by the lower court, but also considered and held without merit a further contention (urged in, but not relied upon or even considered, by the court below), that the Act underlying the indictment, contravened the provisions of the constitution with respect to the separation of the governmental powers, in that it involved an unconstitutional *delegation* of power. This further contention also involved a construction of the Pure Food and Drugs Act, and so was within the field of review under the Criminal Appeals Act.

In the *Keitel* case (211 U. S. 370), this Court reversed an order of the District Court (157 Fed. 396) quashing a first count, sustained an order quashing the second count, and remanded the case for further proceedings. In reaching its conclusion as to the first count, this Court considered at least one ground of contention as to invalidity which, in so far as the decision of the court below discloses, was neither relied on nor considered by that court.

The offense charged in the first count was conspiracy (under §5440 R. S., §37 Criminal Code) to violate the Coal Land Act—§2347 to §2350 R. S.—by entering, through their agents, additional coal lands, after each defendant had already acquired the maximum quantity that any one person was permitted to acquire.

In quashing this count, the lower court held that to constitute a conspiracy under §37 Criminal Code, the fraud charged must be either one to accomplish a criminal or unlawful purpose, or one to accomplish a lawful purpose by criminal or unlawful means; that, if the charge was merely constructive or equitable fraud, there could not be a criminal conspiracy; and that, as the acts charged against defendants did not amount to that common law fraud, and were not denounced as criminal nor prohibited by the Coal Land Act, it followed that the first count did not state an offense. Those questions involved the construction of the Coal Land Act.

In reversing, this Court considered not only the grounds so relied on by the lower court, but also a further contention urged by respondents as requiring an affirmance of the lower court's order quashing the first count. That other contention was that the rules and regulations of the G. L. O. recognized the right of one person to so enter land for another. This contention was held (by this Court) not borne out by

the rules and regulations themselves. It, too, involved construction of the Coal Land Act, but had not been considered by, or even suggested in, the lower court.

The Government in its brief seems to have taken inconsistent positions as to the scope of the review. First, on page 21, it argues that this Court may not consider any other question than the *precise one* relied on by the Court below. It would necessarily follow, if that reasoning were correct, that the decision of this Court could not be an adjudication upon any other than the precise question so relied on below. But, on page 15 of its brief, when arguing for the validity of the delegated powers, it insists that the validity of the Joint Resolution of March 14, 1912, was *conclusively determined* in the cases of *United States* v. *Chavez*, 228 U. S. 525 and *United States* v. *Mesa*, 228 U. S. 533.

Both these cases came to this Court by appeal under the Criminal Appeals Act. The Court below had considered only the meaning of the word "export" in that Resolution, i. e., whether an exporting, within the meaning of the word as used in the Resolution, had been sufficiently alleged in the indictment. So that, in line with the Government's contention on pages 20, 21 and 22 of its brief, if that contention were well founded, no other question than the meaning of the word "export" could possibly have been considered or determined or adjudicated by this Court in those cases. It seems to us inconsistent to contend on the one hand for the narrow scope of the review, and on the other hand to insist that these cases conclusively determine any question arising on this appeal.

The Narrow Reading Has No Support of Authority.

Save the *Keitel* case, which we have already analyzed as really, in practice, supporting our position, not one of the

cases cited on page 21, of the Government's brief, deals with this question.

On page 22, the Government cites *United States* v. *Mescall*, 215 U. S. 26, 31. In that case, after quoting from the *Keitel* case, this Court said that its inquiry was "directed to the particular question decided by the Court below". The context makes it clear that the "question" there referred to, was the construction of the statute on which the indictment was founded.

Respondents do not ask this Court to extend its jurisdiction to any other than the question appealed from, i. e., the validity of the Resolution. They but ask that this broad question be reviewed in all its aspects, to see whether, under that Resolution, a valid judgment of conviction could ever be secured.

II.

THE JOINT RESOLUTION WAS INVALID BECAUSE IT WAS NOT TO GO INTO OPERATION UNTIL AFTER AN OPTIONAL PROCLAMATION, WHICH THE PRESIDENT MIGHT NEVER MAKE.

Making or refusing to make a law, is essentially a legislative function which may not be delegated or surrendered by the Congress.

Each of these delegated powers must be considered on its own merits. In *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 245, this Court said:

> "While administrative and legislative are quite distinct powers, the line which separates, exactly, their exercise, is not easy to define in words. It is best recognized in illustrations."

Without altering the language of the Joint Resolution, we

rearrange it to bring out more clearly its critical provisions, as follows:

> "That, *except under such limitations and exceptions as the President may prescribe* * * * it shall be unlawful * * * *until otherwise ordered by the President* or by Congress * * * to sell * * * in the United States * * * to those countries now engaged in armed conflict in the Chaco (Bolivia and Paraguay) * * * any arms or munitions of war * * * *if the President finds that the prohibition*" (thereof) "*may contribute to the re-establishment of peace* between those countries * * * *and if,* after consultation with the Governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, * * * he makes Proclamation to that effect."

For reasons presently to be stated, the situations dealt with in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 538, aptly illustrate the unfettered discretion which this provision for a purely optional proclamation discloses.

One vice of this Resolution is that it undertook to give to the President an uncontrolled discretion to make or not to make the Proclamation.

Its language reads:

> "*If* the President finds * * * *and if* * * * he makes proclamation to that effect, it shall be unlawful to sell", etc.

The converse is that if he does not make such a proclamation, sales will be lawful. The sales are not prohibited merely upon his findings and consultations.

Although he may have found that the prohibition "may contribute to re-establish peace"; although he may have consulted with other American Republics and secured their cooperation; and although he may have consulted with other governments and secured their cooperation, these actions do not of themselves operate, under the provisions of the Resolution, to make the sales unlawful. They do not become unlawful until the President has chosen to proclaim the above happenings.

That proclamation is a final essential. But the President is under no obligation to proclaim anything. Whether he shall do so or not is purely optional. He may feel that he erred in his original approval of the Resolution, and this may move him not to make the proclamation. He may so decline for any other reason, or indeed, for no reason at all—and this, even though he may have found and done everything else that Congress deemed an essential prerequisite to putting the Resolution into effect. Thus, by merely refusing to take that last optional step, he may effectively prevent the contribution to peace that Congress considered desirable whenever such a situation should arise.

If such a provision for optional proclamation were permissible, under it the President could, in effect, reconsider his previous approval and convert it into a deferred veto—one that the Congress could never vote on or override, and one not provided for in the Constitution. This would be true also, had he vetoed the Resolution in the first instance, and had Congress at that time passed it over his veto. In such a case he might proceed to make the essential findings and consultations; but after doing all this, he might refuse to make the proclamation, with the result that the selling would remain lawful and unrestrained, and the Resolution inoperative.

If this may be done as to this particular Joint Resolution, it might be done as well with any other resolution or act of Congress. Thus, if the Congress were agreeable thereto, by the device of providing for some finding and a further provision that the Act should go into operation, only if and when the President proclaimed such finding, it could invest the President with a power far more effective than the constitutional veto. For, under such a power, by refusing to make any proclamation, he could prevent any such law from ever taking effect; and the only way the Congress could avoid that result would be by passing a new law, making a proclamation mandatory.

If the option to proclaim or not, i. e., to decide whether the law shall take effect or not, is not a surrender of the legislative power to make or not to make a law, it is hard to conceive what would amount to such a surrender in that regard.

If this Resolution had carried no provision for any finding whatever, but had merely declared in express words that, in his uncontrolled discretion, the President might proclaim when the Resolution should become effective, and that it should not go into operation until such proclamation, no one would argue that such a provision was not a surrender of the legislative will. Indeed, such a Resolution would present the same uncontrolled discretion that was condemned in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 430, and in *Schechter Corp.* v. *United States,* 295 U. S. 538, 539.

Equally is this the case where, as here, although there is a provision for a finding, there is no provision *requiring* the making of the proclamation thereof, without which the Resolution was not to go into effect. Here the going into operation was postponed until the proclamation should be made; and the proclamation, because optional in its character, need never be made.

In its brief (p. 16), the Government, when considering the first step, i. e. as to the right to delegate a power to make the finding as to prohibition of sale, quoted from the Panama case to distinguish it in that regard. But upon the contention now being argued with respect to the *optional* character of the proclamation, that very quotation turns against the Government and powerfully condemns the Resolution. We reproduce it as follows:

> "Congress has declared no policy, has established no standard, has laid down no rule. There is no *requirement,* no definition of circumstances and conditions, on which the transportation is to be allowed or prohibited."

So here there is no requirement for a proclamation and no definition of circumstances and conditions under which it *must* be made.

It is true that the optional provision here complained of is carried also in the general Joint Resolution of March 14, 1912, and in the amendatory resolution of January 31, 1922, as well as in Sections 4 and 5 of the Neutrality Resolutions of August, 1935—though Section 1 of the same resolutions furnishes an example of a *mandatory* provision. Many of the earlier resolutions carried an optional provision only, but of these earlier resolutions the present Chief Justice, speaking for the Court, in the Panama case (293 U. S. 388, 422), (as bearing on their force), referred to the lack of court decisions upon them, and thereof said:

> "These early acts were not the subject of judicial decision and, apart from that, they afford no adequate basis for a conclusion that the Congress assumed that it possessed an unqualified power of delegation. They were inspired by the vexations of American commerce through the hostile enterprises of the belligerent powers, they were directed to the effective execution of policies

repeatedly declared by the Congress, and they confided to the President, for the purposes and under the conditions stated, an authority which was cognate to the conduct by him of the foreign relations of the Government."

This lack of authoritative decision is noticeable upon an analysis of the cases cited in the Government's brief, to support its argument under Point I. Some of them, like *Hampton & Co.* v. *United States,* 276 U. S. 394; *Field* v. *Clark,* 143 U. S. 649, are under tariff acts. Others deal with powers confided to the Interstate Commerce Commission on rate regulations, etc. (*Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298; *Reagan* v. *Farmers' Loan and Trust Co.,* 154 U. S. 362; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; see also *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1.) Still others have to do with control of the radio, film and similar industries. (*Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266; *Mutual Film Corp.* v. *Ohio Industrial Comm.* 236 U. S. 245; see also *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176.) One deals with the functions of the Secretary of War, confided to him under the constitutional power to control navigable waters. (*Union Bridge Co.* v. *United States,* 204 U. S. 364.)

But in all those cases the question arose under legislation *already in operation* and with respect to delegation of power over administrative details incident to its enforcement. No one of them involved a determination of the validity of a *condition,* upon the happening of which, a law *not yet in effect,* was or was not to be put into operation. The cases dealing with powers to be exercised in aid of the enforcement of acts of Congress *already in effect,* have no bearing upon the question before us.

Disregarding those cases, there remains of the cases cited by the Government but *The Aurora,* 7 Cranch. 382; *United States* v. *Chavez,* 228 U. S. 525; *United States* v. *Mesa,* 228 U. S. 533; *Talbott* v. *United States,* 208 Fed. 144; certiorari denied, 232 U. S. 722; and *United States* v. *Lucas,* 6 Fed. (2d) 327.

In the *Aurora* case, the revival of an expired non-intercourse act was by a subsequent Act conditioned to take effect upon the President's making a proclamation, which the later act required him to make upon the happening of a specified event. The event was the revocation or modification by France or Great Britain of their respective edicts harmful to American commerce. Such action, when taken, would be easily ascertainable. Of this feature the Supreme Court of Kansas, in *Langworth* v. *Kadel* (141 Kansas 256) said:

> "It was not a matter depending on a *contingency, the happening of which would be plainly discernible to any one,*—as the majority of the resident voters of a city or district, voting in favor of a project—but depended entirely upon the judgment of the governor, as to the necessity of a further extension", etc.

In the *Talbott* case, the Court of Appeals of the Fifth Circuit of the United States (in Texas), in upholding the validity of the Joint Resolution of March 14, 1912, announced that it felt obliged to follow what it considered was the rule of this Court, as announced in the *Chavez* and *Mesa* cases. Therefore, it gave no independent consideration to the question.

In the *Lucas* case the United States District Court for the Western District of Washington (Judge Netterer) similarly upheld the general Joint Resolution of January 31, 1922,

declaring that in doing so it was but following the *Chavez* case.

Of the *Chavez* case, it should be noted first, that no brief for the defendant-respondent was filed in this Court. Second, that no oral argument was made here in its behalf, the only brief and presentation being on the part of the Government. None of the questions now being argued was ever suggested to or considered by this Court, or in the Court below in the *Chavez* case. Fourth, the only question there considered was the meaning of the word "export" in the general resolution of March 14, 1912; and whether the indictment for failure to allege a "taking out" of this country had not failed to sufficiently allege "an export" within the meaning of that resolution.

In *Field* v. *Clark*, 143 U. S. 649, this Court exhaustively considered a provision in the Tariff Act of October 1, 1890, (c. 1244; 26 Stat. 567), for the retaliatory imposition of specified duties on certain products theretofore exempt, to go into effect upon the President's finding discrimination against the United States on the part of those countries, and making proclamation to that effect.

The Act imposed no import duty on sugars, molasses, coffee, tea and certain other products, but provided, by Section 3 thereof, for the suspension of such exemptions in certain cases, as follows:

> "SEC. 3. That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of

such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power *and it shall be his duty to suspend,* by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, * * *."

Respondents sought refund of duties (on imported merchandise) illegally exacted under such Act. No part of such merchandise consisted of articles included in Section 3, but it was claimed that the entire Act was void on the ground that Section 3 constituted an invalid delegation of power. It does not appear whether any proclamation had ever been made by the President under Section 3.

This Court upheld the delegation of power contained in Section 3. It pointed out that the President's judgment (as to whether duties imposed by other countries were reciprocally equal and reasonable) amounted to ascertainment of a fact; that it would be based upon existing commercial regulations of other countries; and that Section 3 imposed a *duty* upon the President, upon his finding such fact, to issue a proclamation declaring the suspension.

That the feature influencing this Court was the absence of discretion in the President, is shown by the following excerpt from the opinion (p. 693):

"Nothing involving the *expediency or the just operation* of such legislation was left to the determination of the President. * * * He had no *discretion in the premises* except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was *absolutely required* when the President ascertained the existence of a particular fact, it can not be said that *in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.*"

The Government's Statement (p. 13 of its Brief) that under Section 3 the President "*might* so proclaim" is thus entirely misleading.

No other case adjudicating a statute, the going into operation of which was made to depend upon the taking of Presidential action, arose until the *Panama* case, *supra*. There, although the President was authorized under certain circumstances to issue a well-defined order of prohibition, yet the circumstances under which the President should make his Proclamation *were so vaguely defined* that the President might arbitrarily either prohibit or permit the interstate transportation of oil. This court summed up its decision in that case as follows (p. 430):

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that §9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of cir-

cumstances and conditions in which the transportation is to be allowed or prohibited."

Similarly, in the present case, the wording of the Joint Resolution is such that the President was under no compulsion to issue his Proclamation unless he should choose to do so. It seems clear that under the principle of the *Field* and *Panama* cases, such lack of explicit directions and mandatory force is fatal to the validity of the Resolution.

III

THE RESOLUTION IS INVALID BECAUSE ITS DURATION, IF EVER IT WENT INTO OPERATION, WAS LEFT LIKEWISE TO THE UNCONTROLLED DISCRETION OF THE PRESIDENT.

Here the critical language was

"It shall be unlawful to sell * * * until otherwise ordered by the President or by Congress."

If the Congress should act it would in effect repeal the Resolution. This would be a purely legislative act. The President, in accomplishing the same thing—for it was to be done either by the Congress or the President—was also taking in essence legislative action.

So long as he did not act, i.e., so long as he made no order, the Resolution would continue in operation and sales would be unlawful. The President was not directed to do anything or determine anything as a basis for making this order. He was not required to give any reason for making it, if he did make it. No restraint, restriction or condition of any kind was put upon him, before he could so act. He could issue the order whenever he wanted to and thus, in his own uncontrolled discretion, bring the law to an end. The making an end of a law is as much a legislative act as is making the law

in the first instance. The reasoning under Point II of this brief is applicable here. With equal force it condemns as invalid a provision for ending the Resolution by mere Presidential proclamation.

IV

THE POWER TO PRESCRIBE LIMITATIONS AND EXCEPTIONS INVALIDATES THE RESOLUTION.

The Resolution declares

> "It shall be unlawful to sell, except under such limitations and exceptions as the President prescribes."

Here was a discretion to make sales lawful that otherwise would have been unlawful. There was no restriction or qualification upon the exercise of that discretion. The Congress announced no principle that should guide the President's action in that regard. If he searched the Resolution to find any direction or standard that he *might follow* in making up his mind whether or not to prescribe the limitation or exception, he would be left as uncertain in that regard after reading it as he was before.

Before reaching the exercise of this power, he must have found that a prohibition of the sale might contribute to restoring peace between Bolivia and Paraguay. It seems certain that in a situation where prohibition would contribute, the lessening of that prohibition would by so much, tend to make that contribution to peace less effective. What was done by the prohibition could be undone by limiting it or making exceptions thereto.

However that may be, the evil here was in bestowing an absolute power by limitation or exception, to neutralize at the President's uncontrolled discretion and at any time, the legislative declaration as to unlawful selling.

V

THE PROHIBITION OF THE SALE OF ARMS AND MUNITIONS NEVER WENT INTO EFFECT BECAUSE THE PRESIDENT FAILED TO COMPLY WITH THE CONDITIONS PRESCRIBED BY THE JOINT RESOLUTION.

While courts will not investigate the manner in which the President or any other high official, has carried out an *executive* or *administrative* function (*Philadelphia and Trenton Ry.* v. *Stimpson,* 14 Pet. 448), such rule has no application where a delegation of *legislative* power is involved. In the *Panama* case this Court said (p. 433):

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, *those determinations must be shown.*
>
> * * *
>
> We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation."

This rule is well-established (*Wichita Railroad & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 59; *Mahler* v. *Eby,* 264 U. S. 32, 44). It requires, in a case where legislative power has been delegated, not only a substantial *compliance* with the conditions laid down by the legislative body, but also an *affirmative showing* that this has been done. Such affirmative showing is lacking in the present case.

This question is reviewable on this appeal, because it involves the validity of the Joint Resolution, in this: that without a sufficient proclamation there could not be the offense of unlawful selling.

By the Joint Resolution, the going into operation of the prohibition was expressly conditioned upon the issuance of a presidential proclamation to the following effect (in addition to the "finding" that such prohibition might contribute to the re-establishment of peace):

1. That the President has consulted with the governments of other American Republics and secured their cooperation;

2. That the President has secured the cooperation of such other governments as he deems necessary.

The presidential proclamation of May 28, 1934, contains the following statement:

> "I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries, and that I have consulted with the governments of other American Republics and *have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution;*"

From such proclamation it appears that the President consulted with the governments of other American Republics and that he secured assurances of the cooperation of such governments *as he deemed necessary.* There is no express declaration—no affirmative statement—that "such governments as I have deemed necessary" included *any* American

Republic. For all that the proclamation discloses, the President may have felt that the cooperation of the European governments producing arms and munitions, or certain of them, was alone essential, and may have deemed the cooperation of the other American Republics not to be necessary. This, however, clearly would not satisfy the requirements of the Joint Resolution.

The phrase "as contemplated by the said Joint Resolution" is not sufficient to indicate unequivocally that the President was asserting a full compliance.

But even if the proclamation be construed as asserting such compliance in general terms or as a conclusion of the President, this would not resolve the difficulty. The broader underlying question would still remain, whether such a general phrase amounts to an *affirmative showing* of compliance. This Court has held otherwise in *Mahler* v. *Eby*, 264 U. S. 32.

That case concerned the delegation to the Secretary of Labor of the power to deport those members of certain specified classes whom he found to be undesirable citizens. The Court held that this was a proper delegation of power but in the case before it the Secretary had failed to make an *express* finding that the individuals concerned were undesirable residents within the meaning of the Act. Holding this omission to be fatal, this Court made the following statement (p. 43):

> "In the case before us the defect in the warrants of deportation has not been supplied. The defect is jurisdictional. There is no authority given to the Secretary to deport except upon his finding, after a hearing, that the petitioners were undesirable residents. There is no evidence that he made such a finding except what is

found in the warrant of deportation. The warrants recite that, upon the evidence, the Secretary has become satisfied that the petitioner aliens have been found in the United States in violation of the Act of May 10, 1920, and that they were finally convicted of the offenses named in the act. They could not have been found in the United States in violation of the Act of 1920 until after the Secretary had found that they were undesirable. * * *"

The President is under no different rule, *Panama Refining Co.* v. *Ryan*, *supra* (p. 433).

In *Mahler* v. *Eby* (supra) there was no imputation of bad faith upon the part of the Secretary. The Court did not question his judgment, and accordingly in reversing the judgment of the District Court it directed that the petitioner should not be discharged "until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against him" (p.44).

The same jurisdictional defect is present here. We assert, in the language of the *Panama* case, that it would be a violation of due process to punish the appellees "for the crime of violating a legislative order", where those "determinations of fact", on which the President's authority to make such order depended, have not been shown.

VI.

THE JOINT RESOLUTION IS NOT PRESENTLY VALID, OR ALIVE FOR THE PURPOSE OF SUSTAINING PROSECUTION FOR OFFENSES HERETOFORE COMMITTED THEREUNDER.

The Joint Resolution of May 28, 1934, provided that, upon a prescribed presidential proclamation, it should thereupon

become unlawful to sell any arms or munitions of war in the United States, to Bolivia or Paraguay,

> "*until otherwise ordered by the President* or by Congress."

By his proclamation of November 14, 1935, the President revoked the former proclamation

> "as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935."

This proclamation further provided that such revocation should not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the earlier proclamation, or the Joint Resolution; and that each should be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any such penalty, forfeiture or liability.

That revoking proclamation made such sales lawful after November 29, 1935. Thereafter, it was no longer a criminal offense to sell (Government's brief, p. 25).

It follows that the Joint Resolution expired on November 29, 1935. That Resolution was intended by Congress as a temporary provision, to be in force during the period between the first proclamation putting the prohibition into effect, and the later proclamation removing it. The Resolution was to be effective "until otherwise ordered by the President or by Congress." That time limit was reached when the revoking proclamation was issued. Having then expired, no further judicial proceedings could be had thereunder, unless competent authority had kept it alive for that purpose.

In *Yeaton* v. *U. S.*, 5 Cranch., 281, this Court accorded early recognition to this principle. Therein it said (pp. 283-4):

> " * * * it has been long settled, on general principles, that after the expiration or repeal of a law, no

> penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In *United States* v. *Chambers*, 291 U. S. 207, this Court said (pp. 223 and 226):

> "In case a statute is repealed or *rendered inoperative*, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose.
>
> * * * * *
>
> Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it."

See also *The Schooner Rachel*, 6 Cranch. 329.

That this is an established principle is freely admitted by the Government (p. 25 of its brief).

The Government insists that the right to prosecute was preserved in our case (1) by the saving proviso of the second Presidential Proclamation and (2) by R. S. Sec. 13. We submit that neither contention is well founded.

THE JOINT RESOLUTION DID NOT CONFER ANY POWER ON THE PRESIDENT TO KEEP IT ALIVE FOR THE SAKE OF PROSECUTIONS (AFTER HIS REVOCATION THEREOF).

The Congress itself made no express provision in the Joint Resolution that offenses committed before the date of the revoking proclamation should be thereafter punished. Nor did it indicate therein any such intention. Nor did it confer upon the President any authority so to keep the Joint Resolution in force. In undertaking to do so, he exercised a power belonging solely to Congress.

The authority to continue a statute in order to permit the

enforcement of liabilities previously incurred thereunder, is like that involved in its original enactment. Since Congress made no effort to confer such power upon the President, that part of his revoking proclamation purporting to keep the Joint Resolution in effect for the purpose of prosecutions is clearly without effect. Nor does the fact that he followed almost literally the language of R. S. Sec. 13, give it any added force.

REVISED STATUTES, SECTION 13, WILL NOT APPLY TO SAVE THIS PROSECUTION.

R. S., Section 13, reads:

> "The *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

By its terms, this section is applicable only where a statute has been *"repealed"*. The word "repeal" means the abrogation of one statute *by another statute. Jessee* v. *DeShong* (Texas), 105 S. W. 1011, 1014; *Oakland Pav. Co.* v. *Hilton*, 69 Cal. 479; *The Butte Consold. Mining Co.* v. *Montana Ore Purchasing Co.*, 24 Mont. 125; *City of St. Louis* v. *Kellman*, 235 Mo. 687. The phrase "unless the repealing Act shall so expressly provide", requires such a repealing Act to bring the case within the operation of the Section.

That section was enacted February 25, 1871, one week after the decision of this court in *United States* v. *Tynen*, 11 Wall. 88. It seems plain that it was enacted for the purpose of preventing a recurrence of such a situation as had arisen in that case, wherein one Act had been impliedly re-

pealed by a subsequent Act, but the later Act made no provision for the preservation of a right to enforce penalties incurred under the former, because whereof this Court had held in the *Tynen* case, that all criminal proceedings based upon the former Act must fail.

As stated in the District Court for the District of Minnesota in *United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, 93:

> "By Section 13, Congress, in words so plain that they do not need any construction, says to the courts, as it has a right to say: 'When *we repeal* a penal statute, you shall not release those who have violated the Act repealed from punishment for violations thereof, unless the repealing Act so expressly provides.'"

Mere termination of an Act is not repeal. *Moore* v. *United States*, 85 Fed. 465.

As Congress has taken no action with respect to the Joint Resolution since originally enacting it, it is clear that the Joint Resolution has never been repealed.

For another reason, the absence of a repealing act forbids the contention that R. S. Section 13 applies in the present case. That section declares a general rule for the construction of repealing statutes. It is not a rule of law in itself, but is merely to be read *into* a *repealing* statute as an effective provision thereof, unless Congress explicitly provides otherwise in the repealing statute itself. As originally enacted, it was the fourth and concluding section of the Act of February 25, 1871, Chapter 71, which was entitled:

> "An Act prescribing the form of enacting and resolving clauses of acts and resolutions of Congress, *and rules for the construction thereof.*"

This Court has defined R. S. Section 13 as follows in *Hertz* v. *Woodman,* 218 U. S. 205, 217:

> "This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, *as a general saving clause to be read and construed as a part of all subsequent repealing statutes,* in order to give effect to the will and intent of Congress. *U. S.* v. *Reisinger,* 128 U. S. 398; *Great Northern Ry. Co.* v. *U. S.,* 208 U. S. 452."

Still another reason forbids its application to our case. Applicable as it was, only to a state of war between Paraguay and Bolivia, it cannot be gainsaid that the Joint Resolution of May 28, 1934, was in every sense but a *temporary* enactment. If punishments are to be saved after the expiration of a *temporary* statute, particular provision must be made by law therefor. A general provision will not suffice to secure this result, unless it is specifically made applicable to *temporary* statutes. *The Irresistible,* 7 Wheaton 551.

In that case a statute of 1818 repealed certain other acts (including a temporary embargo act of 1817, which by its terms was to expire in 1819), but expressly provided that prosecutions for violations of offenses previously committed under all the statutes thereby repealed should be preserved. It was held that this saving provision conferred no power to prosecute under the *temporary* Act after March 3, 1819, the date on which such act should, if not repealed, have expired, for offenses committed prior to the repealing act of 1818.

In that case (p. 552), this Court observed that such a saving clause

> "does not create a power to punish, but preserved that which before existed. Now it is well settled that an offense against a temporary act cannot be punished,

after the expiration of the act, unless a particular provision be made by law for the purpose."

Clearly, R. S., Section 13, is not a *"particular provision"* of law for the purpose of continuing the *temporary* Joint Resolution of May 28, 1934, in effect for the purpose of this prosecution after November 29, 1934, when, by its terms, the Joint Resolution expired.

CONCLUSION

It is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

/s/ Robert D. Shea

WILLIAM WALLACE,

Counsel for Appellees, Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 98

THE UNITED STATES OF AMERICA,

Appellant,

vs.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, SAMUEL J. ABELOW, and ROBERT R. BARR,

Appellees.

BRIEF FOR BARR SHIPPING CORPORATION AND ROBERT R. BARR

NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Appellees,
Barr Shipping Corporation and
Robert R. Barr.

CORPORATE PRESS, INC., NEW YORK CITY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, *Appellant*, vs. CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, SAMUEL J. ABELOW, and ROBERT R. BARR, *Appellees*.	No. 98

BRIEF FOR BARR SHIPPING CORPORATION AND ROBERT R. BARR

The appellees, Barr Shipping Corporation and Robert R. Barr, are content with the reasons already expressed by the other appellees in their briefs for sustaining the demurrer and therefore, for the sake of brevity, will not present a separate argument.

Respectfully submitted,

NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Appellees,
Barr Shipping Corporation and
Rober R. Barr.

SUPREME COURT OF THE UNITED STATES.

No. 98.—October Term, 1936.

The United States of America, Appellant, *vs.* Curtiss-Wright Export Corporation, Curtiss Aeroplane & Motor Company, Inc., and Barr Shipping Corporation et al.	Appeal from the District Court of the United States for the Southern District of New York.

[December 21, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. The Joint Resolution (c. 365, 48 Stat. 811) follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict,

or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

"Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

The President's proclamation (48 Stat. 1744), after reciting the terms of the Joint Resolution, declares:

"Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

"And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

"And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder."

On November 14, 1935, this proclamation was revoked (49 Stat. —), in the following terms:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reestablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability in-

curred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Appellees severally demurred to the first count of the indictment on the grounds (1) that it did not charge facts sufficient to show the commission by appellees of any offense against any law of the United States; (2) that this count of the indictment charges a conspiracy to violate the joint resolution and the Presidential proclamation, both of which had expired according to the terms of the joint resolution by reason of the revocation contained in the Presidential proclamation of November 14, 1935, and were not in force at the time when the indictment was found. The points urged in support of the demurrers were, first, that the joint resolution effects an invalid delegation of legislative power to the executive; second, that the joint resolution never became effective because of the failure of the President to find essential jurisdictional facts; and third, that the second proclamation operated to put an end to the alleged liability under the joint resolution.

The court below sustained the demurrers upon the first point, but overruled them on the second and third points. 14 F. Supp. 230. The government appealed to this court under the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, as amended, U. S. C. Title 18, § 682. That act authorizes the United States to appeal from a district court direct to this court in criminal cases where, among other things, the decision sustaining a demurrer to the indictment or any count thereof is based upon the invalidity or construction of the statute upon which the indictment is founded.

First. It is contended that by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reestablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the Presi-

dent's unfettered discretion; and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the law-making power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 294. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other

source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See *Penhallow* v. *Doane*, 3 Dall. 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Brittanic Majesty and the "United States of America." 8. Stat.—European Treaties—80.

The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual", was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one. Compare *The Chinese Exclusion Case* 130 U. S. 581, 604, 606. In that convention, the entire absence of state power to deal with those affairs was thus forcefully stated by Rufus King:

"The states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war." 5 Elliot's Debates 212.[1]

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones* v. *United States*, 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 *et seq.*), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co.* v. *United States*, 224 U. S. 583, 600-601; Crandall, *Treaties, Their Making and Enforcement*, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

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[1] In general confirmation of the foregoing views, see 1 Story on the Constitution, 4th ed., §§ 198-217, and especially §§ 210, 211, 213, 214, 215 (p. 153), 216.

In *Burnet* v. *Brooks,* 288 U. S. 378, 396, we said, "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." Cf. *Carter* v. *Carter Coal Co., supra,* p. 295.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

"The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." 8 U. S. Sen. Reports Comm. on Foreign Relations, p. 24.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power

which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents, p. 194.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the execu-

tive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie* v. *Hare*, 239 U. S. 299, 311, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*" (Italics supplied.)

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.

Let us examine, in chronological order, the acts of legislation which warrant this conclusion:

The Act of June 4, 1794, authorized the President to lay, regulate and revoke embargoes. He was "authorized" "whenever, in his opinion, the public safety shall so require" to lay the embargo upon all ships and vessels in the ports of the United States, including those of foreign nations "under such regulations as the circumstances of the case may require, and to continue or revoke the same,

whenever he shall think proper." C. 41, 1 Stat. 372. A prior joint resolution of May 7, 1794 (1 Stat. 401), had conferred *unqualified* power on the President to grant clearances, notwithstanding an existing embargo, to ships or vessels belonging to citizens of the United States bound to any port beyond the Cape of Good Hope.

The Act of March 3, 1795 (c. 53, 1 Stat. 444), gave the President authority to permit the exportation of arms, cannon and military stores, the law prohibiting such exports to the contrary notwithstanding, the only prescribed guide for his action being that such exports should be in "cases connected with the security of the commercial interest of the United States, and for public purposes only."

By the Act of June 13, 1798 (c. 53, § 5, 1 Stat. 566), it was provided that if the government of France "shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities" theretofore maintained against vessels and property of the citizens of the United States, "in violation of the faith of treaties, and the laws of nations, and shall thereby acknowledge the just claims of the United States to be considered as in all respects neutral, . . . it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared; and he shall be, and is hereby authorized to make proclamation thereof accordingly."

By § 4 of the Act of February 9, 1799 (c. 2, 1 Stat. 615), it was made "lawful" for the President, "if he shall deem it expedient and consistent with the interest of the United States", by order to remit certain restraints and prohibitions imposed by the act with respect to the French Republic, and also to revoke any such order "whenever, in his opinion, the interest of the United States shall require."

Similar authority, qualified in the same way, was conferred by § 6 of the Act of February 7, 1800, c. 10, 2 Stat. 9.

Section 5 of the Act of March 3, 1805 (c. 41, 2 Stat. 341), made it lawful for the President, whenever an armed vessel entering the harbors or waters within the jurisdiction of the United States and required to depart therefrom should fail to do so, not only to employ the land and naval forces to compel obedience, but "if he shall think it proper, it shall be lawful for him to forbid, by proclama-

tion, all intercourse with such vessel, and with every armed vessel of the same nation, and the officers and crew thereof; to prohibit all supplies and aid from being furnished them" and to do various other things connected therewith. Violation of the President's proclamation was penalized.

On February 28, 1806, an act was passed (c. 9, 2 Stat. 351) to suspend commercial intercourse between the United States and certain parts of the Island of St. Domingo. A penalty was prescribed for its violation. Notwithstanding the positive provisions of the act, it was by § 5 made "lawful" for the President to remit and discontinue the restraits and prohibitions imposed by the act at any time "if he shall deem it expedient and consistent with the interests of the United States" to do so. Likewise in respect of the Non-intercourse Act of March 1, 1809, (c. 24, 2 Stat. 528); the President was "authorized" (§ 11, p. 530), in case either of the countries affected should so revoke or modify her edicts "as that they shall cease to violate the neutral commerce of the United States", to proclaim the fact, after which the suspended trade might be renewed with the nation so doing.

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. Many, though not all, of these acts are designated in the footnote.[2]

It well may be assumed that these legislative precedents were in mind when Congress passed the joint resolutions of April 22, 1898, 30 Stat. 739; March 14, 1912, 37 Stat. 630; and January 31, 1922, 42 Stat. 361, to prohibit the export of coal or other war material. The resolution of 1898 authorized the President "in his discretion, and with such limitations and exceptions as shall seem to him expedient" to prohibit such exportations. The striking identity of language found in the second resolution mentioned above and in the one now under review will be seen upon comparison. The resolution of March 14, 1912, provides:

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[2] Thus, the President has been broadly "authorized" to suspend embargo acts passed by Congress, "if in his judgment the public interest should require it" (Act of December 19, 1806, c. 1, § 3, 2 Stat. 411), or if, "in the judgment of the President", there has been such suspension of hostilities abroad as may render commerce of the United States sufficiently safe. Act of April 22, 1808, c. 52, 2 Stat. 490. See, also, Act of March 3, 1817, c. 39,

"That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"Sec. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

The third resolution is in substantially the same terms, but extends to any country in which the United States exercises extra-territorial jurisdiction, and provides for the President's action not only when conditions of domestic violence exist which *are* promoted, but also when such conditions *may be* promoted, by the use of such arms or munitions of war.

We had occasion to review these embargo and kindred acts in connection with an exhaustive discussion of the general subject of delegation of legislative power in a recent case, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421-422, and in justifying such acts,

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§ 2, 3 Stat. 361. Compare, but as to reviving an embargo act, the Act of May 1, 1810, c. 39, § 4, 2 Stat. 605.

Likewise, Congress has passed numerous acts laying tonnage and other duties on foreign ships, in retaliation for duties enforced on United States vessels, but providing that if the President should be satisfied that the countervailing duties were repealed or abolished, then he might by proclamation suspend the duties as to vessels of the nation so acting. Thus, the President has been "authorized" to proclaim the suspension. Act of January 7, 1824, c. 4, § 4, 4 Stat. 3; Act of May 24, 1828, c. 111, 4 Stat. 308; Act of July 24, 1897, c. 13, 30 Stat. 214. Or it has been provided that the suspension should take effect whenever the President "shall be satisfied" that the discriminating duties have been abolished. Act of March 3, 1815, c. 77, 3 Stat. 224; Act of May 31, 1830, c. 219, § 2, 4 Stat. 425. Or that the President "may direct" that the tonnage duty shall cease to be levied in such circumstances. Act of July 13, 1832, c. 207, § 3, 4 Stat. 578. And compare Act of June 26, 1884, c. 121, § 14, 23 Stat. 53, 57.

Other acts, for retaliation against discriminations as to United States commerce, have placed broad powers in the hands of the President, "authorizing" even the total exclusion of vessels of any foreign country so offending (Act of June 19, 1886, c. 421, § 17, 24 Stat. 79, 83), or the increase of duties on its goods or their total exclusion from the United States (Act of June 17, 1930, c. 497, § 338, 46 Stat. 590, 704), or the exclusion of its goods or the detention, in certain circumstances, of its vessels, or the exclusion of its vessels or nationals from privileges similar to those which it has denied to citizens of the United States (Act of September 8, 1916, c. 463, §§ 804-806, 39 Stat. 756,

pointed out that they confided to the President "an authority which was cognate to the conduct by him of the foreign relations of the government."

The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved; or in its nature, or in both combined.

799-800). As to discriminations by particular countries, it has been made lawful for the President, by proclamation, which he "may in his discretion, apply . . . to any part or all" of the subjects named, to exclude certain goods of the offending country, or its vessels. Act of March 3, 1887, c. 339, 24 Stat. 475. And compare Act of July 26, 1892, c. 248, 27 Stat. 267. Compare, also, authority given the Postmaster General to reduce or enlarge rates of foreign postage, among other things, for the purpose of counteracting any adverse measures affecting our postal intercourse with foreign countries. Act of March 3, 1851, c. 20, § 2, 9 Stat. 587, 589.

The President has been "authorized" to suspend an act providing for the exercise of judicial functions by ministers, consuls and other officers of the United States in the Ottoman dominions and Egypt whenever he "shall receive satisfactory information" that the governments concerned have organized tribunals likely to secure to United States citizens the same impartial justice enjoyed under the judicial functions exercised by the United States officials. Act of March 23, 1874, c. 62, 18 Stat. 23.

Congress has also passed acts for the enforcement of treaties or conventions, to be effective only upon proclamation of the President. Some of them may be noted which "authorize" the President to make proclamation when he shall be "satisfied" or shall receive "satisfactory evidence" that the other nation has complied: Act of August 5, 1854, c. 269, §§ 1, 2, 10 Stat. 587; Act of March 1, 1873, c. 213, §§ 1, 2, 17 Stat. 482; Act of August 15, 1876, c. 290, 19 Stat. 200; Act of December 17, 1903, c. 1, § 1, 33 Stat. 3. *Cf.* Act of June 11, 1864, c. 116, § 1, 13 Stat. 121; Act of February 21, 1893, c. 150, 27 Stat. 472.

Where appropriate, Congress has provided that violation of the President's proclamations authorized by the foregoing acts shall be penalized. See, *e. g.*, Act of June 19, 1886; Act of March 3, 1887; Act of September 8, 1916; Act of June 17, 1930—all *supra*.

In *The Laura,* 114 U. S. 411, 416, this court answered a challenge to the constitutionality of a statute authorizing the Secretary of the Treasury to remit or mitigate fines and penalities in certain cases, by repeating the language of a very early case (*Stuart* v. *Laird,* 1 Cranch 299, 309) that the long practice and acquiescence under the statute was a "practical exposition . . . too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." In *Lithographic Co.* v. *Sarony,* 111 U. S. 53, 57, the constitutionality of R. S. § 4952, conferring upon the author, inventor, designer or proprietor of a photograph certain rights, was involved. Mr. Justice Miller, speaking for the court, disposed of the point by saying: "The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

In *Field* v. *Clark,* 143 U. S. 649, 691, this court declared that ". . . the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." The rule is one which has been stated and applied many times by this court. As examples, see *Ames* v. *Kansas,* 111 U. S. 449, 469; *McCulloch* v. *Maryland,* 4 Wheat. 316, 401; *Downes* v. *Bidwell,* 182 U. S. 244, 286.

The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.

We deem it unnecessary to consider, *seriatim,* the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect

upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

Second. The second point raised by the demurrer was that the Joint Resolution never became effective because the President failed to find essential jurisdictional facts; and the third point was that the second proclamation of the President operated to put an end to the alleged liability of appellees under the Joint Resolution. In respect of both points, the court below overruled the demurrer, and thus far sustained the government.

The government contends that upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justify this conclusion. The demurrer in the present case challenges the validity of the statute upon three separate and distinct grounds. If the court below had sustained the demurrer without more, an appeal by the government necessarily would have brought here for our determination all of these grounds, since in that case the record would not have disclosed whether the court considered the statute invalid upon one particular ground or upon all of the grounds alleged. The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act. *United States* v. *Hastings,* 296 U. S. 188, 192.

In *Langnes* v. *Green,* 282 U. S. 531, where the decree of a district court had been assailed upon two grounds and the circuit court of appeals had sustained the attack upon one of such grounds only, we held that a respondent in certiorari might nevertheless urge in this court in support of the decree the ground which the intermediate appellate court had rejected. That principle is applicable here.

We proceed, then, to a consideration of the second and third grounds of the demurrers which, as we have said, the court below rejected.

1. The Executive proclamation recites, "I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics *and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution.*" This finding satisfies every requirement of the Joint Resolution. There is no suggestion that the resolution is fatally uncertain or indefinite; and a finding which follows its language, as this finding does, cannot well be challenged as insufficient.

But appellees, referring to the words which we have italicized above, contend that the finding is insufficient because the President does not declare that the cooperation of such governments as he deemed necessary included any American republic and, therefore the recital contains no affirmative showing of compliance in this respect with the Joint Resolution. The criticism seems to us wholly wanting in substance. The President recites that he has consulted with the governments of other American republics, and that he has been assured of the cooperation of such governments as he deemed necessary *as contemplated by the joint resolution.* These recitals, construed together, fairly include within their meaning American republics.

2. The second proclamation of the President, revoking the first proclamation, it is urged, had the effect of putting an end to the Joint Resolution, and in accordance with a well-settled rule, no penalty could be enforced or punishment inflicted thereafter for an offense committed during the life of the Joint Resolution in the absence of a provision in the resolution to that effect. There is no doubt as to the general rule or as to the absence of a saving clause in the Joint Resolution. But is the case presented one which makes the rule applicable?

It was not within the power of the President to repeal the Joint Resolution; and his second proclamation did not purport to do so. It "revoked" the first proclamation; and the question is,

did the revocation of the proclamation have the effect of abrogating the resolution or of precluding its enforcement in so far as that involved the prosecution and punishment of offenses committed during the life of the first proclamation? We are of opinion that it did not.

Prior to the first proclamation, the Joint Resolution was an existing law, but dormant, awaiting the creation of a particular situation to render it active. No action or lack of action on the part of the President could destroy its potentiality. Congress alone could do that. The happening of the designated events—namely, the finding of certain conditions and the proclamation by the President—did not call the law into being. It created the occasion for it to function. The second proclamation did not put an end to the law or affect what had been done in violation of the law. The effect of the proclamation was simply to remove for the future, a condition of affairs which admitted of its exercise.

We should have had a different case if the Joint Resolution had expired by its own terms upon the issue of the second proclamation. Its operative force, it is true, was limited to the period of time covered by the first proclamation. And when the second proclamation was issued, the resolution ceased to be a rule for the future. It did not cease to be the law for the antecedent period of time. The distinction is clearly pointed out by the Superior Court of Judicature of New Hampshire in *Stevens* v. *Dimond,* 6 N. H. 330, 332, 333. There, a town by-law provided that if certain animals should be found going at large between the first day of April and the last day of October, etc., the owner would incur a prescribed penalty. The trial court directed the jury that the by-law, being in force for a year only, had expired so that the defendant could not be called upon to answer for a violation which occurred during the designated period. The state appellate court reversed, saying that when laws "expire by their own limitation, or are repealed, they cease to be the law in relation to the past, as well as the future, and can no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they cease to be law, merely because the time they were intended to regulate had expired. . . . A

very little consideration of the subject will convince any one that a limitation of the time to which a statute is to apply, is a very different thing from the limitation of the time a statute is to continue in force."

The first proclamation of the President was in force from the 28th day of May, 1934, to the 14th day of November, 1935. If the Joint Resolution had in no way depended upon Presidential action, but had provided explicitly that, at any time between May 28, 1934, and November 14, 1935, it should be unlawful to sell arms or munitions of war to the countries engaged in armed conflict in the Chaco, it certainly could not be successfully contended that the law would expire with the passing of the time fixed in respect of offenses committed during the period.

The judgment of the court below must be reversed and the cause remanded for further proceedings in accordance with the foregoing opinion.

It is so ordered.

Mr. Justice McREYNOLDS does not agree. He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.